Hong Kong, China, and the Disruption of Antitrust

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Abstract

Under the "One Country, Two Systems" rule, Hong Kong and China maintain different legal systems. This dichotomy applies also in antitrust: China adopted its Anti-Monopoly Law in 2007, while Hong Kong waited until 2012 to introduce its Competition Ordinance (and another three years to fully implement it). This article compares the antitrust laws of these two jurisdictions, and their enforcement, in the light of a turning point: the disruption caused by so-called Big Tech. Interestingly, while the competition laws of Hong Kong and China are substantively similar to each other and to legal precedent in other jurisdictions, Hong Kong has adopted an adversarial system of enforcement, and China an administrative system. Through an analysis of recent antitrust developments in the two jurisdictions, this article shows the importance of agency independence, due process, and robust judicial scrutiny for the proper functioning of an administrative system of enforcement; and at the same that judicial scrutiny in an adversarial system needs the certainty of legal rules, in particular to clarify the burden of proof to be met by the competition authorities. In the light of these findings, this article proposes that the two principles of due process and robust but workable judicial scrutiny should remain at the heart of antitrust. This is important at a time when, globally, the frustration with market concentration in certain sectors, and especially with Big Tech, may lead policymakers to propose changes to antitrust enforcement that could weaken these two principles, and to attribute higher value to the speed of decision-making, over the importance of a thorough analysis.

Introduction

It has been remarked that digital platforms disrupt "not just incumbent industries, but also academic imaginations about the future course of capitalism."[1] And, one could add, not just academic imaginations, but also the way that policymakers conceive of antitrust, and competition authorities view their mandate. The changes in the US, from the introduction of new antitrust legislation,[2] to the new administration's efforts to remodel the role of the FTC,[3] are perhaps the most visible, alongside the efforts of the EU to adopt effective regulation of Big Tech.[4] Although these measures signal a shift in the enforcement priorities of established antitrust authorities (US), and towards ex ante regulation (EU), the basic tenets of competition law are not challenged per se.

In other countries, politicians and antitrust authorities sometimes make the case for expanding the powers of the competition authorities and reduce procedural protections, often in the context of an assessment of the market power of Big Tech. For example, on 20 April 2021, the Australian Competition and Consumer Commission (ACCC), the German Bundeskartellamt and the UK Competition and Markets Authority (CMA) issued a joint statement on merger control enforcement,[5] highlighting the challenges posed by merger review particularly in "dynamic and fast-paced markets" where "the last decade has seen the rise of acquisitive tech giants" leading to, in some cases, highly concentrated markets.[6] The authorities stress that all

[1] Gernot Grabher and Jonas König, *Disruption, Embedded. A Polanyan Framing of the Platform Economy* SOCIOLOGICA 95, 95 (2020).
[2] Cecilia Kang, *Lawmakers, Taking Aim at Big Tech, Push Sweeping Overhaul of Antitrust*, THE NEW YORK TIMES (June 11, 2021, updated June 29, 2021) https://www.nytimes.com/2021/06/11/technology/big-tech-antitrust-bills.html (archived Aug. 26, 2021).
[3] Kiran Stacey, *Washington vs Big Tech: Lina Khan's battle to transform US antitrust,* FINANCIAL TIMES (Aug. 10, 2021) https://www.ft.com/content/eba8d3d7-dba7-4389-858c-5406c31b413d (archived Aug. 26, 2021).
[4] Javier Espinoza, *Brussels faces test of its will to tackle Big Tech*, FINANCIAL TIMES (Aug. 4, 2021).
[5] ACCC, Bundeskartellamt, CMA, *Joint statement on merger control enforcement* (Apr. 20, 2021) https://www.accc.gov.au/publications/joint-statement-on-merger-control-enforcement (archived Aug. 26, 2021).
[6] *Id.* at ¶ 10.

mergers are assessed in a forward looking manner and "uncertainty as to the future should not necessarily mean that potentially anticompetitive mergers are cleared because of that uncertainty".[7] On 20 July 2021, the UK Government issued two consultations on reforming competition and consumer policy.[8] In antitrust, amongst other wide ranging proposals, it is envisaged that the CMA may be granted powers to carry out sectoral inquiries faster, and to issue sector-wide interim orders;[9] to speed up merger investigations;[10] to have "stronger and faster enforcement against illegal anticompetitive conduct";[11] potentially to limit the judicial scrutiny of the CMA decisions in competition law matters.[12] As Pablo Ibáñez Colomo recently pointed out,[13] behind some of these observed shifts there seems to be a new mistrust of procedural guarantees generally, and judicial review specifically. It also appears that "swift and decisive intervention" may now be prioritized "much more than getting it right".[14]

The recent crack-down against Big Tech in China has given a new dimension to this debate. On the one hand, the way and the speed with which China has been able to curb its Big Tech companies would appear to be the envy of some of the agencies mentioned above, but the very same speed and methods of enforcement have also shown important issues that arise when very

[7] *Id.* at ¶ 8. See also the statements of the ACCC's Chairman Rod Sims in November 2020, highlighting the difficulties faced by the ACCC in merger control, particularly as regards "the weight the Federal Court gives to evidence from business executives of the merging parties"; the "Court's approach to the evidence it requires from the ACCC in order to prove its case". See Gilbert+Tobin, *In conversation with Rod Sims: COVID-19 and the fitness and flexibility of Australia's merger law* (Dec. 1, 2020) https://www.gtlaw.com.au/insights/conversation-rod-sims-covid-19-fitness-flexibility-australias-merger-law (archived Aug. 26, 2021).
[8] UK Government, *Reforming Competition and Consumer Policy*', Consultation (July 20, 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004096/CCS0721951242-001_Reforming_Competition_and_Consumer_Policy_Web_Accessible.pdf (archived Aug. 26, 2021); UK Government, *A new pro-competition regime for digital markets*, Consultation (July 20, 2021) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf (archived Aug. 26, 2021).
[9] UK Government, *Reforming Competition and Consumer Policy*, *id.*, at ¶¶ 1.45–1.83.
[10] *Id.* at ¶¶ 1.119–1.127.
[11] *Id.* at ¶¶ 1.133–1.141.
[12] *Id.* at ¶¶ 1.200–1.208.
[13] Pablo Ibáñez Colomo, *When did the rule of law come to be seen as an inconvenience?* CHILLIN'COMPETITION Blog (June 30, 2021), https://chillingcompetition.com/2021/06/30/when-did-the-rule-of-law-come-to-be-seen-as-an-inconvenience/ (archived August 15, 2021).
[14] *Id.*

wide discretion is granted to regulators in the absence of cogent judicial oversight. On the other hand, and at the somewhat opposite end of the scale, Hong Kong shows what happens when an adversarial enforcement of the rules is adopted, particularly in the context of a newly created system. In terms of Big Tech and regulation (but not yet antitrust), Hong Kong has quickly acquired the character of a new frontier: the new data law imposes a rethink for hitherto established social media and platforms, with ByteDance becoming the first company to announce the withdrawal of its app TikTok from Hong Kong, over a year ago.[15]

This article takes a step back from the heat of the debate. The arguments in favor of a more robust enforcement of antitrust in highly concentrated markets are not in question. The issues that arise with Big Tech, in particular as regards increasing concentration in the digital sector, appear to be real,[16] and the trend towards increased scrutiny of Big Tech is global. This has led some commentators to state that there is not much difference between the crackdown against Big Tech in China and in other countries.[17] As Angela Zhang notes, "what makes China exceptional, however, is not *why* it regulates, but rather *how* it regulates its tech firms."[18] The focus here is not on reforming antitrust to tackle Big Tech. Rather, the competition laws of China and Hong Kong are considered from a comparative standpoint, to highlight that *the form* of antitrust intervention matters.

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[15] Naomi Xu Elegant, *TikTok is withdrawing its app from Hong Kong as tech reckons with new security law*, FORTUNE (July 7, 2020), https://fortune.com/2020/07/07/tiktok-hong-kong-app/ (archived Aug. 16, 2021).
[16] As regards the position of the Big Tech companies in the US, see for example Sean Markowicz, *Big Tech's market might in five charts*, SCHRODERS (Sept. 16, 2020), https://www.schroders.com/en/insights/economics/big-techs-market-might-in-five-charts/ (archived Aug. 26, 2021). See also THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS, Table 13.1 (Cambridge, Massachusetts and London, England, Belknap Press of Harvard University Press, 2019): out of the top ten global companies by market value in 2018, number 1 to 5 are, in the order: Apple, Amazon, Alphabet (Google's parent), Microsoft and Facebook. Number 6 is Alibaba, number 8 is Tencent Holdings.
[17] See for example Zachary Karabell, *China's Didi Crackdown Isn't All That Different From U.S. Moves Against Big Tech*, TIME (July 9, 2021), https://time.com/6079121/chinas-didi-crackdown-big-tech/ (archived July 17, 2021).
[18] Angela H. Zhang, *Agility over Stability: China's Great Reversal in Regulating the Platform Economy* (2021), at 5 (unpublished manuscript), https://ssrn.com/abstract=3892642 (archived Aug. 20, 2021) (emphasis in original).

China and Hong Kong share several cultural norms,[19] but have had very different histories. Since 1997, Hong Kong has been part of China but has retained its own economic and administrative system under the constitutional principle known as the "One Country, Two Systems" rule. Both jurisdictions have adopted competition law recently and the newly set-up authorities are grappling with the universal issue of how to establish their legal authority, whilst facing different constraints. In China, the main constraint appears to be the internal bureaucracy, leading to a swinging pendulum between lax and strict regulation.[20] In Hong Kong, the main constraints faced by the competition authorities appears to be the business community and a judiciary currently in flux between the opposite imperatives to safeguard the rights in the Basic Law and to accommodate a new reality.

In this article, Section I provides a thorough overview of antitrust law in Hong Kong and in China, focusing on the substantive rules (in subsection A); the tools for detection and enforcement available to the competition authorities (in subsection B); and the institutional setup (in subsection C). The analysis is informed by recent case law in the two jurisdictions. Conclusions are drawn in section II.

I. Antitrust Law in China and in Hong Kong

China and Hong Kong are both jurisdictions with a relatively recent history of application of competition law.

[19] Chee Kiong Tong, *Rethinking Chinese Business*, in CHINESE BUSINESS, RETHINKING GUANXI AND TRUST IN CHINESE BUSINESS NETWORKS (Chee-Kiong Tong ed., 2014). See also Andreas Stephan, *Cartel Laws Undermined: Corruption, Social Norms and Collectivist Business Cultures*, 37 JOURNAL OF LAW AND SOCIETY, 345 (2010).

[20] Zhang posits that the "volatile style of policymaking" in China is a result of the interaction of four key players: the top leadership, the agencies, the firms and the public. See Zhang, *Agility over Stability*, *supra* note 18, at 5.

Legal provisions (laws and administrative rules) to tackle anticompetitive behavior existed in China prior to the adoption of the Anti-Monopoly Law (AML).[21] The approach was piecemeal.[22] For the purposes of this paper, particularly important are the Price Law,[23] effective since 1 May 1998, a "consumer protection law with a few antitrust provisions outlawing cartels"[24] including the prohibition to engage in price-fixing, and the Anti Unfair Competition Law,[25] effective from 1 December 1993 which prohibits tying, below-cost pricing in certain cases, bid rigging and some other unfair trade practices. When the violations predated the entry into force of the AML, companies have been sanctioned for cartel behavior under the Price Law,[26] and these laws remain in force today. In fact, they have been used to sanction businesses in the technology sector. On 8 February 2021 the Chinese State Administration for Market Regulation (SAMR), reportedly[27] fined Vipshop RMB 3 million under the Anti Unfair Competition Law and Price Law (but not the AML), for imposing traffic limits on sellers also

[21] Anti-Monopoly Law of the People's Republic of China (中國人民共和國反壟斷法) promulgated by the Standing Committee of the National People's Congress (Aug. 30, 2007, effective Aug. 1, 2008) (AML), http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml (archived June 20, 2021).

[22] For details of the various provisions in force, including the Bidding Law, which came into force on 1 January 2000, see Bruce M. Owen et al., *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST LAW JOURNAL 231, 233 (2008).

[23] Price Law of the People's Republic of China (**中华人民共和国价格法**) promulgated by the Standing Committee of the National People's Congress (29 December 1997, effective 1 May 1998) (Price Law), http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300046121.shtml (archived June 20, 2021).

[24] See for example Price Law, Chapter II: Price Acts of the Operators. See also ANGELA H. ZHANG, CHINESE ANTITRUST EXCEPTIONALISM (Oxford Univ. Press 2021), 66.

[25] Anti Unfair Competition Law of the People's Republic of China (revised) (中华人民共和国反不正当竞争法［已被修订]) promulgated by the Standing Committee of the National People's Congress (2 September 1993, effective 1 December 1993, revised in 2017 and 2019) (Anti Unfair Competition Law), http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100050495.html (archived 16 August 2021).

[26] The first extraterritorial application of Chinese competition law concerned the enforcement of the Price Law: see the 2013 decision of the NDRC (one of the antitrust enforcers before the creation of the SAMR in 2018) in the international *LCD Panel Manufacturing Cartel*, sanctioning violations that pre-dated the entry into force of the AML. See Samson Yuen, *Taming the "Foreign Tigers": China's Anti-trust Crusade Against Multinational Companies*, 4 CHINA PERSPECTIVES (2014), http://chinaperspectives.revues.org/6587 (archived 10 September 2020). See also Hannah Ha, John Hickin and Philip Monaghan, *China, in* CARTELS: ENFORCEMENT, APPEALS & DAMAGES ACTIONS 37 (Nigel Parr and Euan Burrows eds, 2014).

[27] Yong Bai and Dave Poddar, *Antitrust in China and Across the Region*, CLIFFORD CHANCE QUARTERLY UPDATE (January to March 2021) www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/04/asia-pacific-quarterly-antitrust-briefing---q1-2021.pdf (archived July 17, 2021).

active on other platforms (an early instance of the so-called "choose one from two" practice that was the main theory of harm in the Alibaba decision considered below).[28] In an even earlier case, on 30 December 2020 reportedly SAMR announced "in a social media post" that it had issued fines of RMB 500,000 for unspecified issues of "irregular pricing" against Alibaba's Tmall; Jingdong (Alibaba's competitor) and Vipshop:[29] this appears to be the first case when tech companies were sanctioned in China. More generally, investigations can also be carried out under the AML and one of the other laws (such as the Price Law).[30]

In Hong Kong, competition law was initially adopted on a sectoral basis (notably telecommunications and broadcasting were subject to competition rules since the early 2000)[31] alongside the enforcement of regulation. It is an interesting observation that often competition law makes its first appearance in a jurisdiction in the telecommunications sector. This is true of countries as diverse as the UK, where modern provisions to tackle anticompetitive

[28] See *infra* section I, A, 2.

[29] Yilei Sun et al., *China fines JD.Com, Alibaba's Tmall Vipshop for irregular pricing*, REUTERS (Dec. 30, 2020) https://www.reuters.com/article/us-china-market-regulation-idUSKBN29413C (archived Aug. 16, 2021). More details about the behavior sanctioned can be found in: Xu Wei, *China Fines JD, Tmall and Vipshop for Shady Double-11 Shopping Event Promos*, YICAI GLOBAL (Dec. 31, 2021) https://www.yicaiglobal.com/news/chinese-e-tailers-jdcom-tmall-vipshop-get-slapped-with-usd77000-each-for-shady-promos (archived Aug. 27, 2021). Unfortunately, from the information available it is not possible to understand the legal basis for this fine.

[30] See for example one of the very first cartel cases, the 2010 *Rice Noodles Cartel*, investigated by the Guanxi Price Bureau under the Price Law and the AML. See Xue Qiang, Yang Xixi, *Anti-Cartel Law and Enforcement in China: A Survey, in* CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS ¶ 6.03 (Adrian Emch and David Stallibrass eds., 2013); Alert Memo, Cleary Gottlieb Steen & Hamilton LLP, *First Price Cartel Cases Under the Chinese AML* (May 21, 2010), https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/first-price-cartel-cases-under-the-chinese-aml.pdf (archived Aug. 27, 2021). See also the *Xiamen Courier Industry Price Self-Discipline Convention Cartel* (Xiamen Price Bureau, 2014) University of Melbourne, CHINA COMPETITION BULLETIN (March/April 2014), at 5, https://law.unimelb.edu.au/__data/assets/pdf_file/0008/1796462/China-Competition-Bulletin-March-April-2014.pdf (archived Aug. 27, 2021).

[31] Since the enactment of the Telecommunications Ordinance (電訊條例) (2000) (Cap 106) https://www.elegislation.gov.hk/hk/cap106 (archived July 6, 2021); and the Broadcasting Ordinance (廣播條例) (2000) (Cap 562) https://www.elegislation.gov.hk/hk/cap562!en-zh-Hant-HK (archived July 6, 2021). See Sandra Marco Colino, *A History of Competition: The Impact of Antitrust on Hong Kong's Telecommunications Markets*, 29 FORDHAM INTELLECTUAL PROPERTY, MEDIA & ENTERTAINMENT LAW JOURNAL 931 (2019).

agreements and abuses of a dominant position were first introduced in the telecommunications licence of the incumbent, British Telecoms,[32] Singapore,[33] Bahrain,[34] and The Bahamas.[35]

The debate whether to adopt a comprehensive competition law started in China in the early 1990s; the accession of China to the WTO in 2001 provided a powerful argument in favour of enactment and in 2008 the AML came into force, "after fourteen years of wrangling and debate".[36] As has been noted,[37] "when a law takes so long to enact in China, that usually signifies that it is highly controversial".[38]

In Hong Kong, the adoption of the Competition Ordinance (CO)[39] followed two decades of debate "as to whether such legislation was compatible with the region's free market economy."[40] There was considerable resistance among industry and government to adopt an all-encompassing competition law, and there was a widespread view that Hong Kong did not require it, as it was a small and externally oriented economy, considered already highly competitive, although there is a perception in Hong Kong itself that competitiveness does not

[32] In the UK, prior to the adoption of the Competition Act 1998 (which came into force in 2000), a comprehensive system of review of anticompetitive agreements and abuses of dominance along the European model was to be found only in BT's telecommunications licence, following an amendment by the then regulator, Oftel to include the so-called 'fair trading condition'. See *R v Director General of Telecommunications ex parte British Telecommunications plc*, [1996] England and Wales High Court Admin 391.
[33] Singapore adopted sector specific competition laws for the telecoms sector following its full liberalisation in April 2000. In September 2000, the Infocomm Development Authority of Singapore (iDA) introduced the *Code of Practice for Competition in the Provision of Telecommunications Services* (the Telecom Competition Code), under s 26 of the Telecommunication Act.
[34] Legislative Decree No. 48 of 2002 (the Telecommunications Law).
[35] Bahamas Communications Act 2009, published in the Official Gazette on 2 June 2009. The relevant competition provisions are found in 'Part XI – Competition Provisions'. Prior to the Communications Act coming into force, there were general 'fair competition' conditions in the telecommunications licences.
[36] Angela H. Zhang, *Taming the Chinese Leviathan: Is Antitrust Regulation a False Hope?,* STANFORD JOURNAL OF INTERNATIONAL LAW 195, 196 (2015)
[37] Owen et al., *supra* note 22.
[38] *Id.* at 232.
[39] Competition Ordinance (競爭條例) (Cap 619), promulgated by the Legislative Council, 12 June 2012, effective 14 December 2015 (CO) https://www.elegislation.gov.hk/hk/cap619 (archived July 6, 2021).
[40] Sandra Marco Colino, *Distribution Agreements under China's Anti-Monopoly Law and the Hong Kong Competition Ordinance*, 1 CHINA ANTITRUST LAW JOURNAL 1, 2 (2017).

extend to all domestic sectors, notably business-to-consumer (such as grocery).[41] The adoption of a generally applicable competition law in Singapore in 2004 might have been a factor in the government's decision in 2007 to adopt the CO.[42] Eventually, the CO was promulgated in June 2012, but came fully into force only on 14 December 2015, following a lengthy implementation period during which both the Hong Kong Competition Commission (HKCC)[43] and the Hong Kong Competition Tribunal (HKCT) were created.[44]

A. The Substantive Provisions of the Law

As has been noted,[45] the adoption and enforcement of a legislation that "grew from the soil of Western democracy and free market economy" in China is remarkable, in light of the historical and political realities, where "the demarcation line between normal market activities and illegal profit making is sometimes vague."[46] If in socialist countries such as China competition law can be considered a tool towards the developments of free markets, seen with suspicion, in advanced capitalistic societies such as Hong Kong, competition law may be seen with suspicion for the opposite reason, as imposing unnecessary constraints on existing free markets: the adoption of a comprehensive competition law in Hong Kong is equally surprising.

When the AML was finally adopted in China, and the CO was adopted in Hong Kong, however, the substantive provisions of the law were remarkably similar, and in fact modelled on,

[41] CONOR QUIGLEY AND SUZANNE RAB, HONG KONG COMPETITION LAW (Bloomsbury, 2017), at 293. See also Mark Williams, *The Lion City and the Fragrant Harbour: The political economy of competition policy in Hong Kong and Singapore compared* THE ANTITRUST BULLETIN 517, 541 (2009): '(w)hilst the externally traded sector is privately owned, diverse and internationally competitive, many sectors of the domestic economy are very concentrated and dominated by a small number of family controlled … conglomerates'.
[42] Ping Lin and Thomas W Ross, *Toward a more robust competition policy regime for Hong Kong,* JOURNAL OF ANTITRUST ENFORCEMENT 109, 112 (2021); QUIGLEY AND RAB, *supra* note 41, at 2.
[43] CO, *supra* note 39, at Part 9. The HKCC's functions are detailed in section 130.
[44] CO, *supra* note 39, at section 135.
[45] Zhang, *Taming the Chinese Leviathan, supra* note 36, at 195–196.
[46] Ting Gong, *Whistleblowing: what does it mean in China?*, 23 INTERNATIONAL JOURNAL OF PUBLIC ADMINISTRATION 1899, 1916 (2000).

precedents from the EU, and Singapore, immediately recognizable to competition lawyers the world over.

Looking at enforcement in the digital sector, the reported cases in China are mostly against domestic Big Tech for abuse of a dominant position or for non-compliance with the merger rules. The cases for abuse of a dominant position tend to be focused on anticompetitive practices of dominant marketplace platforms that favor certain merchants over others. One of the most pressing concerns against platforms in the EU, namely the loss of control over personal data,[47] is not a concern in China. The SAMR Platform Economy Guidelines,[48] issued in February 2021, include a section on the potential that agreements entered into by platforms may breach the prohibition of anticompetitive agreements, including by platform operators requiring users to offer terms and trading conditions at least equal than those offered on other platforms (so called "parity" clauses).[49] However, it appears that agreements amongst e-commerce and online providers have not been investigated as anticompetitive agreements under the AML.

On the contrary, in Hong Kong only one case was brought in the online/digital sector, against online travel agent for anticompetitive "parity clauses" with hotels for the provisions of accommodation in Hong Kong.[50]

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[47] See for example the German case against Facebook, where the Bundeskartellamt found that Facebook had engaged in 'abusive data processing policy'. See Press Release, Bundeskartellamt, Bundeskartellamt prohibits Facebook from combining user data from different sources (Feb. 7, 2019) https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html (archived July 19, 2021).

[48] SAMR, THE ANTI-MONOPOLY GUIDELINES OF THE ANTI-MONOPOLY COMMISSION OF THE STATE COUNCIL ON THE PLATFORM ECONOMY [hereinafter Platform Economy Guidelines] (国务院反垄断委员会关于平台经济领域的反垄断指南) (Feb. 7, 2021) http://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html (archived Aug. 25, 2021.

[49] *Id.* at art 7.

[50] In this case, the HKCC accepted commitments and settled the case. It is considered at s I, B, 2, *infra.*

It is noteworthy that the recent wave of antitrust enforcement in the digital sector in China follows a number of statements by the top leadership in China in December 2020 about the importance of antitrust enforcement for the "prevention of the disorderly expansion of capital",[51] and "curbing monopolistic behavior".[52] As more particularly analyzed below,[53] this highlights a characteristic of the enforcement system in China, resulting in a pendulum between initial lax enforcement and quick and decisive action after the top leadership decides to intervene. Angela Zhang[54] has persuasively argued that this makes the regulatory response to perceived issues more agile, at the expenses of stability. The SAMR was swift in taking action: its Draft Antitrust Guidelines on the Platform Economy,[55] were issued in November 2020 (just before the pronouncements by the top leadership), followed by the final guidelines in February 2021.[56] The year 2021 also marks the beginning of robust enforcement of these rules against Big Tech in China.

1. The prohibition against Anticompetitive Agreements

In both China and Hong Kong, the prohibitions against anticompetitive agreements are drafted broadly in line with precedent from other jurisdictions, in particular the EU and Singapore (but

[51] Politburo meeting chaired by President Xi Jinping on 11 December 2020. "Xi Focus: Xi chairs leadership meeting on economic work for 2021", XINHUANET (Dec. 11, 2021), http://www.xinhuanet.com/english/2020-12/11/c_139582746.htm (archived Aug. 27, 2021). This was followed by other pronouncements specifically on the tech sector. See Zheping Huang, *Xi warns Against Tech Excess in Sign Crackdown Will Widen,* BLOOMBERG LAW (March 16, 2021), https://news.bloomberglaw.com/antitrust/xi-warns-against-tech-excess-in-sign-crackdown-will-widen?context=article-related (archived Aug. 25, 2021).

[52] Central Economic Work Conference, 18 December 2020. This is the keynote annual conference where China's economic priorities for the coming year are announced. Curbing monopolistic behavior is one of eight major policy priorities for 2021. See also "China holds key economic meeting to plan for 2021" XINHUANET (Dec. 18, 2021), http://www.xinhuanet.com/english/2020-12/18/c_139601199.htm (archived Aug. 25, 2021).

[53] See *infra* section I.C.2.

[54] Zhang, *Agility over Stability*, *supra* note 18, at 5.

[55] SAMR, *Announcement of the SAMR on Public Consultation on the "Guidelines for Anti-Monopoly in the Field of Platform Economy (Draft for Comment)* (市场监管总局关于《关于平台经济领域的反垄断指南（征求意见稿）》公开征求意见的公告）(10 November 2020) http://www.samr.gov.cn/hd/zjdc/202011/t20201109_323234.html (archived Aug. 27, 2021).

[56] Platform Economy Guidelines, *supra* note 48.

similar provisions are to be found in the competition laws of Australia, New Zealand and the US), although there appear to be differences in the treatment of vertical agreements.

As regards horizontal agreements, in both jurisdictions, the fight against price-fixing cartels is a focus of enforcement. In Hong Kong, the HKCC acknowledges this specifically,[57] and this is borne out by the case law. In its barely six years of operation, seven procedures were commenced by the HKCC;[58] six of them concerned Serious Anti-competitive Conduct,[59] which broadly refers to hard-core cartel agreements (in five cases,[60] price fixing was an issue). Only one case related to a breach of the Second Conduct Rule.[61] In China, reports exist of at least 95 cases, at the central and at the local level, where the antitrust authorities have acted against the parties for "price fixing",[62] although, as Angela Zhang[63] points out, the cases in the public domain do not show the full picture: officials she interviewed indicated that many more cases were investigated than have been disclosed."[64]

In China, article 13 of the AML prohibits so-called "monopoly agreements".[65] These include hard-core cartel agreements (price fixing;[66] output restrictions[67] (and agreements that restrict

[57] See Press Release, HKCC, Competition Commission launches "Combat Price Fixing Cartels" Campaign (Nov. 9, 2020), https://www.compcomm.hk/en/media/press/files/EN_PR_CC_launches_Combat_Price_Fixing_Cartels_Campaign_20201109.pdf (archived July 8, 2021).
[58] All cases in the HKCT and all judgments are published on the website of the HKCC. HKCC, Cases in the Competition Tribunal, www.compcomm.hk/en/enforcement/enforcement/competition_tribunal.html (archived 8 July 2021).
[59] As defined in CO, *supra* note 39, at s 2(1).
[60] *Competition Commission v Nutanix Hong Kong Ltd & Others*, CTEA1/2017 (Nutanix Bid Rigging); *Competition Commission v W Hing Construction Company & Others*, CTEA2/2017; *Competition Commission v Kam Kwong Engineering Company Ltd & Others*, CTEA1/2018; *Competition Commission v Fungs E&M Engineering Company Limited & Others,* CTEA1/2019; *Competition Commission v Quantr Limited and Cheung Man Kit,* CTEA1/2020; *Competition Commission v T.H. Lee Book Company Limited & Others*, CTEA2/2020.
[61] *Competition Commission v Linde HKO Limited Tse Chun Wah and Linde GmbH* (21 December 2020) CTEA3/2020.
[62] Exhaustive reports of cases decided by the competition authorities in China are often not available. The information on the 95 cases mentioned has been compiled from secondary sources, referred to in the footnotes.
[63] ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 24.
[64] *Id.* at 94.
[65] AML, *supra* note 21, at art. 13.
[66] AML, *supra* note 21, at art. 13(1).
[67] AML, *supra* note 21, at art. 13(2).

the development of new technologies);[68] allocating markets;[69] and boycotts).[70] Although the notion of a "monopoly agreement" seems to imply a measure of market power for the parties to the agreement, it is understood that this provision captures anticompetitive agreements, similar to art 101 TFEU in the EU, or the First Conduct Rule under the Competition Ordinance of Hong Kong.[71] Anticompetitive agreements can be exempted under article 15 of the AML, if the parties can prove that their agreements lead to improvements to technological development or research (article 15(1); improves product quality and efficiency (article 15(2); achieves social public interest benefits, including environmental protection (article 15(4));[72] or for crisis (article 15(5)) and export cartels (article 15(6)). Similar to the conditions for the application of article 101(3) TFEU, these exemptions can only apply if the gains are shared by the consumers and provided that there are no severe restrictions of competition.[73]

In Hong Kong, anticompetitive agreements or practices are prohibited under the so-called First Conduct Rule.[74] The CO includes a general exclusion from the First Conduct Rule for agreements that enhance overall economic efficiency, with the same cumulative requirements as found in article 101(3) TFEU, and, broadly, article 15 of the AML, namely that: the agreement contributes to improving production or distribution or technical or economic progress; consumers receive a fair share of the efficiencies and the restriction imposed must be

[68] AML, *supra* note 21, at art. 13(4).
[69] AML, *supra* note 21, at art. 13(3).
[70] AML, *supra* note 21, at art. 13(5).
[71] Colino, *Distribution Agreements*, *supra* note 40, at 22–23.
[72] Art. 15(4) is sometimes quoted in the debate on competition law and sustainability, as a possible model that could be followed in other jurisdictions.
[73] For example, in the Mayang Shale Brick Cartel, the parties invoked art. 15 but the exemption was not granted as the cartel caused serious harm to competition and harmed consumer interests. See Mayang Shale Brick Cartel (Hainan AIC, 2015) University of Melbourne, CHINA COMPETITION BULLETIN (May/June 2015), at 5 https://law.unimelb.edu.au/__data/assets/pdf_file/0004/1796449/China-Competition-Bulletin-May-June-2015.pdf (archived Aug. 27, 2021).
[74] CO, *supra* note 39, at Division 1, Subdivision 1. See also HKCC, GUIDELINE—THE FIRST CONDUCT RULE (2015).

indispensable and do not eliminate competition altogether.[75] The HKCC interprets the relevant provisions as a "defence" in response to an allegation that the First Conduct Rule has been contravened.[76] Although cartel activity and price fixing specifically are instances of Serious Anti-competitive Conduct, as defined,[77] under the terms of the CO, there is nothing to indicate that this defence would not be available in cartel cases and in fact, this defence was argued in one of the first cases to be brought to the HKCT, the Decoration Contractors cartel case.[78] As has been remarked, if this precedent were followed in the future, the law in Hong Kong would have already "moved away from standard best practice", as it would admit evidence of efficiencies in collusion cases.[79]

Concerning vertical agreements, in China, Article 14 of the AML specifically prohibits "monopoly agreements" between "business operators and their trading parties" that "fix the price" for "resale to a third party". Although this provision may appear to outlaw retail price maintenance (RPM) agreements, looking at articles 13, 14 and 15 together, it seems that the AML establishes a "prohibition plus exemption" regime for both anticompetitive horizontal and vertical agreements (such as RPM). These are unlawful, unless an exemption applies under article 15. However, in China the case law[80] suggests that resale price maintenance is subject

[75] CO, *supra* note 39, at s I of Schedule I.
[76] HKCC, GUIDELINE—THE FIRST CONDUCT RULE, *supra* note 74, at ¶ 4.3.
[77] CO, *supra* note 39, at s 2(1). See also HKCC, GUIDELINE—THE FIRST CONDUCT RULE at ¶ 5.4, ¶ 6.15.
[78] *Competition Commission v Hing Construction Co Ltd & Others* [2019] HKCT 3 (Decoration Contractors case) (Liability Judgment).
[79] Lin and Ross, *supra* note 42, at 120.
[80] Investigations can be carried out under art 13 and 14 AML: see for example the cases against (foreign) car distributors: *Hubei Car Distribution Cartel* (Hubei Price Bureau, 2014) University of Melbourne, CHINA COMPETITION BULLETIN (September/October 2014), at 2, https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1796478/China-Competition-Bulletin-September-October-2014.pdf (archived June 20, 2021); *Guandong Nissan Distributors Cartel* (Guangdong DRC, 2015) University of Melbourne, CHINA COMPETITION BULLETIN (September/October 2015), at 6, https://law.unimelb.edu.au/__data/assets/pdf_file/0009/1796445/China-Competition-Bulletin-September-October-2015-3.pdf (archived June 20, 2021). See also *Infant Formula Milk Cartel* (NDRC, 2011), discussed in Ha, Hickin and Monaghan, *supra* note 26, at 42. This is an RPM case in which, very unusually, three companies received total immunity, against the NDRC's own guidelines.

to a prohibition rule, making it unlawful irrespective of its impact of competition:[81] the authorities often treat such agreements as if they were a form of price fixing cartel. As has been remarked by Sandra Marco Colino,[82] the adoption of a "bright line approach" of per se illegality of RPM agreements is probably understandable in a jurisdiction where competition law has been adopted recently. This is also the approach taken by the Supreme People's Court (SPC) in the only appeal to date that was successful in the first instance (and then reversed).[83]

In Hong Kong, the HKCC takes the view that vertical arrangements are generally unlikely to be considered Serious Anti-Competitive Conduct, although a literal reading of section 2(1) of the CO would not exclude this possibility, and "in certain circumstances, resale price maintenance may constitute an instance of Serious Anti-competitive conduct."[84] As has been noted, although vertical restraints generally are assumed to benefit the party "higher up in the chain of production",[85] the immediate beneficiaries of resale price maintenance tend to be the retailers, which request it to protect their investment. This may be a reason why the HKCC specified that resale price maintenance will always be considered under the First Conduct Rule,[86] although theoretically it could also be an abuse of market power. In the *Nutanix* Bid Rigging judgment,[87] the HKCT took a strict view of a case where the anticompetitive conduct in question consisted of several bilateral vertical agreements between an upstream supplier and downstream resellers, in an arrangement reminiscent of a "hub and spoke" agreement. Unlike in precedents from the EU and the UK, the HKCT did not consider whether the resellers were

[81] On the difference between rules and standards, see PABLO IBÁÑEZ COLOMO, THE SHAPING OF EU COMPETITION LAW 30; 64–67 (Cambridge Univ. Press, 2018).
[82] Colino, *Distribution Agreements*, *supra* note 40, at 34.
[83] See *infra* footnote 264.
[84] The exclusion is in CO, *supra* note 39, at section 5 of Schedule I. See GUIDELINE—THE FIRST CONDUCT RULE, *supra* note 74, at ¶¶ 5.5–5.6.
[85] SANDRA MARCO COLINO, COMPETITION LAW OF THE EU AND UK 190 (Oxford Univ. Press 8th ed. 2019).
[86] HKCC, GUIDELINE—THE FIRST CONDUCT RULE, *supra* note 74, at ¶¶ 6.71–6.77.
[87] *Competition Commission v Nutanix Hong Kong Ltd* [2019] HKCT 2 (Nutanix Bid Rigging) (Liability Judgment).

aware of the arrangement, therefore making it possible to sanction a series of vertical agreements with a "horizontal element", as a cartel.[88]

The SAMR is very much aware of the potential for data and algorithms to lead to illegal collusion between competitors;[89] to facilitate vertical anticompetitive agreements; [90] and facilitate the creation and maintenance of hub-and-spoke agreements.[91] These factors are mentioned in the Platform Economy Guidelines, although not in any detail. This perhaps signals that the SAMR will be keeping these aspects under review in the near future. The Platform Economy Guidelines, also signal that the SAMR will consider issues relating to "parity" clauses in contracts for online services.[92] To date, agreements amongst e-commerce and online providers do not appear to have been investigated as anticompetitive agreements under the AML, although local e-commerce companies have reportedly blown the whistle on cartels in the courier industry.[93]

The existence of parity clauses in the contracts of online travel agents provides the only example of enforcement in the online/digital sector in Hong Kong. As this case was settled by the HKCC, it will be considered below.[94]

2. Abuse of a Dominant Position

[88] See also Marcus Pollard and Kathleen Gooi, *Work in Progress: Hong Kong's Competition Law Five Years On,* 11 JOURNAL OF EUROPEAN COMPETITION LAW AND PRACTICE 372, 375–376 (2020).
[89] Platform Economy Guidelines, *supra* note 48.
[90] *Id.* at art. 7.
[91] *Id.* at art. 8.
[92] *Id.* at art. 7.
[93] In the *Xiamen Courier Industry Price Self-Discipline Convention Cartel*, *supra* note 30, e-commerce companies were said to have driven down the profits of the courier companies, and this was considered one reason for the cartel. See also *Ningxia Courier Companies Cartel* (Ningxia Price Bureau, 2014) University of Melbourne, CHINA COMPETITION BULLETIN (March/April 2014), at 6, https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1796424/China-Competition-Bulletin-Jan-Feb-2015.pdf (archived Aug. 27, 2021).
[94] See *infra* section I.B.2.

In both China and Hong Kong, the prohibition of abuse of a dominant position appears to be drafted in line with European (and Singapore) precedent.

In Hong Kong, the Second Conduct Rule[95] prohibits businesses with substantial market power from abusing it. The Guideline issued by the Competition Commission makes it clear that the notion of a "substantial degree of market power" is interpreted in line with the notion of dominance in EU law.[96] Since the CO has been in force, only one proceeding was brought for a breach of the Second Conduct Rule,[97] in December 2020. It is alleged that the respondent, Linde HKO Limited, abused its position of substantial market power in the market for the supply of medical gases in Hong Kong, at the time of the Covid-19 pandemic. Linde is accused of engaging in exclusionary practices against the only other potential competitor in the supply to public hospitals. According to the HKCC, these practices include unjustified denial of supply of medical gases, and the imposition of unreasonable terms. This is also the first case in Hong Kong where one of the respondents, Linde Gmbh, is a non-Hong Kong based business.

In China, firms that have a dominant position are required under article 6 of the AML[98] not to abuse it. Article 17 provides a list of practices considered abusive.[99] This includes exclusive dealing as a theory of harm. Up until October 2020, there had not been cases for abuse of dominance against Big Tech in China. In a paper published in July 2020,[100] the authors provide statistics up to the end of June 2020. Up to them, there had been 48 investigations, and the most

[95] CO, *supra* note 39, at s 21(1).
[96] HKCC, GUIDELINE: THE SECOND CONDUCT RULE (2015) Part 3.
[97] *Competition Commission v Linde HKO Limited Tse Chun Wah and Linde GmbH* (21 December 2020) CTEA3/2020.
[98] AML, *supra* note 21, at art. 6.
[99] AML, *supra* note 21, at art. 17.
[100] Cheng Liu, Yun Bi and Jeff Liu, *Most Targeted Industries and Conduct in China's Antitrust Investigations against Abuse of Dominance*, CPI COMPETITION POLICY INTERNATIONAL (30 July 2020), https://www.competitionpolicyinternational.com/most-targeted-industries-and-conduct-in-chinas-antitrust-investigations-against-abuse-of-dominance/ (archived Aug. 20, 2021).

frequently targeted industries were, first, public utilities; second, active pharmaceutical ingredients (API); followed by high tech and IP. At that time, although the SAMR had "started to pay closer attention to the conduct of the major internet giants", they had not yet "officially penalized any internet platform companies." This was so, even though in 2019 the SAMR had issued its "Interim Provisions on Prohibiting Abuse of Market Dominant Position"[101] whose article 11 mentioned factors to be considered in assessing "the Internet and other new economic business operators". Thereafter, things escalated quickly.

In the Platform Economy Guidelines,[102] the "ability to master and process relevant data"[103] is a factor to be considered when assessing market dominance together with "ease of data acquisition", one of a number of barriers to entry or expansion.[104] The SAMR expressly considers that platforms may constitute an essential facility;[105] and that big data and algorithms can aid price differentiation and other anticompetitive differential treatment.[106] Article 15 of the Platform Economy Guidelines, entitled "Restricted Transactions" deals with issues of restrictive dealing. Specifically, art 15(1) states that "behaviors that require operators on the platform to "choose one of two" among competing platforms or restrict the counterparty to the transaction to conduct exclusive transactions with them" can constitute abuse of dominance. The SAMR recognizes in article 15 that punitive measures ("such as blocking stores, searching rights, traffic restrictions, technical obstacles and deducting deposit") are more serious than seeking to incentivize users to choose only one platform. In the second case, the dominant player may seek to grant "subsidies, discounts, preferential treatments, traffic resource support

[101] SAMR, INTERIM PROVISIONS ON PROHIBITING ABUSE OF MARKET DOMINANT POSITION（禁止滥用市场支配地位行为暂行规定）(July 1, 2019), http://gkml.samr.gov.cn/nsjg/fgs/201907/t20190701_303057.html (archived Aug. 20, 2021).
[102] Platform Economy Guidelines, *supra* note 48.
[103] *Id.* at art. 11(3).
[104] *Id.* at art. 11(5).
[105] *Id.* at art. 14.
[106] *Id.* at art. 17(1).

etc." and this may have positive effects on "the interests of operators and consumers on the platform, and the overall welfare of society". The SAMR also lists a number of "legitimate reasons for restricting transactions."

None of these must have been applicable to the practices of Alibaba Group. On 10 April 2021, the SAMR imposed a fine of RMB 18.228 billion[107] (approximately US$2.8 billion) against Alibaba Group Holdings Limited (Alibaba) for abuse of a dominant position by engaging in "choose one from two" behavior. The decision was very widely reported in the global media,[108] although the practice of "choose one from two" has been a concern in Chinese antitrust since at least 2017.[109] The notoriety of Alibaba and the perceived magnitude of the fine—more than double the previously highest fine imposed under the AML in China, RMB 6.088 billion (approximately US$939 million) against Qualcomm, caught the public's imagination. It is sobering to reflect, however that in terms of percentage of turnover, this fine equates to only 4 percent of Alibaba's turnover in China in the previous year.[110]

Because of its importance, it is worth considering the Alibaba decision in some detail. First, substantively the SAMR applies the law against abuse of a dominant position in the AML and

[107] Press Release, SAMR, The SAMR imposed administrative penalties on Alibaba Group Holdings Limited's "choose one from two" policy in the online retail platform service market in China in accordance with the law (市场监管总局依法对阿里巴巴集团控股有限公司在中国境内网络零售平台服务市场实施"二选一"垄断行为作出行政处罚) (10 April 2021) http://www.samr.gov.cn/xw/zj/202104/t20210410_327702.html (archived July 24, 2021). This is a press release attaching two documents (in Mandarin): a 'Penalty Notice' and an 'Administrative Instructions Document'.

[108] See for example Raymond Zhong, *China Fines Alibaba $2.8 Billion in Landmark Antitrust Case,* THE NEW YORK TIMES (Apr. 9, 2021) https://www.nytimes.com/2021/04/09/technology/china-alibaba-monopoly-fine.html (archived Aug. 16, 2021); Ryan McMorrow and Yuan Yang, *Chinese regulators fine Alibaba record $2.8bn,* THE FINANCIAL TIMES (Apr. 10, 2021,) https://www.ft.com/content/bb251dcc-4bff-4883-9d81-061114fee87f (archived August 16, 2021).

[109] In an article published in March 2021, the authors report that this practice triggered at least eight antitrust and unfair competition investigations in the platform economy since 2017. See Wei Huang and others, *Antitrust Guidelines for the Platform Economy in the Era of Enhanced Antitrust Scrutiny,* COMPETITION POLICY INTERNATIONAL (March 29, 2021), Footnote 9 https://www.competitionpolicyinternational.com/antitrust-guidelines-for-the-platform-economy-in-the-era-of-enhanced-antitrust-scrutiny/ (archived Aug. 25, 2021).

[110] See *infra* section I.A.4.

in the Platform Economy Guidelines. Alibaba is found to have abused its dominant position in the market for online retail platform services in China through the imposition of a number of restrictions on merchants seeking to use platforms other than the Alibaba's platforms ("choose one from two" policy). Broadly, the abuse therefore consists of seeking to impose restrictive dealings by implementing sophisticated incentive/penalty measures on firms that do not comply with exclusivity requirement. This is a recognized theory of harm in many jurisdictions around the world.

Second, procedurally, in the Penalty Notice we read: "the parties waived the right to make statements, defenses and to request a hearing" ("当事人放弃陈述、申辩和要求举行听证的权"). This is a startling admission from a Western perspective: the companies that are subject to a large fine in countries of mature enforcement of the competition laws tend to appeal the decisions through different grades of appeal.[111] Not so in China and the reasons for this are complex and will be considered below.[112]

Third, the decision is published in two documents attached to a press release: a Penalty Notice comprising 27 pages of analysis and leading to the order to stop the illegal acts and pay the fine, and an Administrative Instruction Document which is three pages long and provides details of the actions that Alibaba is expected to undertake in order to comply with the order: Alibaba must draw up a rectification plan and submit annual compliance reports for the next three years. Again, this is a departure from the norm in decisions reached by Western

[111] For example, according to its Annual Report 2020, the General Court of the EU (the court of first instance) in 2020 completed 41 state aid and competition cases; 78 competition cases were still pending at the end of 2020. 104 state aid and competition cases were pending before the Court of Justice (on appeal) at the end of 2020. See COURT OF JUSTICE OF THE EUROPEAN UNION, THE YEAR IN REVIEW—ANNUAL REPORT 2020 (2021) https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_pan_2020_en.pdf (archived Aug. 26, 2021).
[112] See *infra* section I.C.2.

competition authorities: by way of comparison, the EU decision against Google in the *Google (Shopping)* case[113] reaches 215 pages in length. This aspect is linked to the point above: given that the parties accept the findings of the authorities in China, the authorities do not need to prove their case to the same extent.

Finally, the decision was reached with incredible speed by Western standards: only three months to close the investigation. This has led commentators to praise the decision as "thoughtful and impressive".[114] Whilst one can sympathize with the frustration generated by protracted cases such as the *Google (Shopping)* case mentioned above,[115] that lasted about 8 years and is under appeal in Europe,[116] it is important to consider the Alibaba decision in its context, as highlighted above.

Further to the Alibaba decision, other companies are rumored to be in the firing line for forthcoming penalties for abuse of a dominant position. According to press reports, food delivery giant Meituan may be facing a "roughly US$1 billion fine",[117] in the near future.

3. Merger Control

In Hong Kong, the CO includes a prohibition of mergers that substantially lessen competition or that are likely to do so.[118] Like in other jurisdictions, notably Singapore and the UK, merger control is voluntary, in the sense that the parties can decide not to notify after self-assessment.

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[113] *Google Search (Shopping)* (Case COMP/ AT.39740) Summary of Commission Decision [2017] OJ C9/11.
[114] See for example Bai and Poddar, *supra* note 27.
[115] *Id.*
[116] Jane Wakefield, *Google starts appeal against £2bn shopping fine* BBC (Feb. 12, 2020), https://www.bbc.co.uk/news/technology-51462397 (archived Aug. 26, 2021).
[117] Bhaswati Guha Majumder, *Chinese Antitrust Regulator to impose $1 Billion Fine on Food-Delivery Giant Meituan* SWARAJYA (Aug. 7, 2021), https://swarajyamag.com/news-brief/chinese-antitrust-regulator-to-impose-1-billion-fine-on-food-delivery-giant-meituan (archived Aug. 26, 2021).
[118] CO, *supra* note 39, at schedule 7, s 3.

Although the Merger Control Rule is drafted in general terms, for historical reasons it only applies to mergers in the telecommunications sector, where one of the parties is a telecommunications carrier licensee.[119] Given this, the main authority that will consider mergers in Hong Kong is the Communications Authority, which has concurrent jurisdiction in competition law matters with the HKCC.[120] Further, the authorities in Hong Kong are specifically barred from assessing the compatibility of mergers agreements with the First or the Second Conduct Rule:[121] it appears from the Merger Rule Guidelines issued by the HKCC,[122] that the HKCC takes the view that any ancillary restrictions (such as non-compete clauses) are also excluded from review, when they are directly related and necessary to the implementation of the merger.[123]

This blanket exclusion has a number of consequences.[124] First, other jurisdictions may have more of a saying on mergers that affect consumers in Hong Kong, than the Hong Kong authorities themselves. For example, when Cathay Pacific acquired Hong Kong Express Airways in 2019, the transaction was reviewed and approved by the Taiwan Fair Trade Commission, for the competition aspects affecting Taiwan passengers but could not be assessed for its effect on the relevant markets in Hong Kong.[125] Further, the original rationale to subject the telecommunications industry to a more intrusive regulatory burden than other sectors has

[119] The Merger Rule in the CO is substantially similar to s 7P(1) of the Telecommunication Ordinance.
[120] See HKCC AND COMMUNICATIONS AUTHORITY, MEMORANDUM OF UNDERSTANDING (2015), ¶ 1.2.
[121] CO, *supra* note 39, at s 4 of Schedule 1.
[122] HKCC, MERGER RULE GUIDELINES (2015), ¶¶ 2.18–2.19.
[123] See also Stephen Crosswell, Tom Jenkins and Donald Pan, *The Merger Control Review: Hong Kong,* THE LAW REVIEWS ¶ ii (2021), https://thelawreviews.co.uk/title/the-merger-control-review/hong-kong (archived Aug. 9, 2021).
[124] Although in 2019 there were indications suggesting that the Merger Rule could be made operational for all sectors, this has not yet materialized. See Kanis Leung, *Tightening of Hong Kong's Competition Laws to Cover Mergers on the Horizon, says Competition Commission chairwoman,* SOUTH CHINA MORNING POST (Jan. 17, 2019) https://www.scmp.com/news/hong-kong/hong-kong-economy/article/2182425/tightening-hong-kongs-competition-laws-cover (archived Aug. 25, 2021).
[125] Lin and Ross, *supra* note 42, at 125. It has been reported that Rasul Butt, then senior executive director of the HKCC (and currently (since May 2021) its chief executive officer), stated during an online event in April 2021 that 'it's not a matter of whether we will have merger powers. It's a matter of when…'. See Crosswell, Jenkins and Pan, *supra* note 123, at footnote 8.

been eclipsed somewhat, given the disruptions caused by technological developments and in particular the advent of platforms offering voice and data communications services. Finally, it has been recognized that in some sectors,[126] there exists the phenomenon of so-called "killer acquisitions", characterized by established businesses acquiring promising start-ups or nascent competitors, with a view to delay or suppress the commercialization of new products. As far as Hong Kong is concerned, the authority does not have the means to assess the competition aspects of any of these mergers.

Not so in China. Article 19 of the Platform Economy Guidelines specifically clarifies that mergers that do not meet the thresholds for notification can be proactively investigated by the SAMR and allows for the merging parties to notify mergers voluntarily when these do not meet the thresholds. The Q&A[127] accompanying the publication of the Platform Economy Guidelines suggests that the authority had killer acquisitions very much in mind: "the field of platform economy may be more prone to this situation due to the characteristic of new business formats and new models, or involving start-ups, emerging platforms, etc."[128] .

More generally, acquisitions by Chinese tech companies have become a concern of the authorities. Contrary to the situation in Hong Kong, in China, mergers that meet certain requirements need to be notified to the SAMR.[129] Similar to European precedent (and unlike in Singapore), merger notification is mandatory, and the parties cannot by law complete a

[126] Notably, in the pharmaceutical sector. The existence of killer acquisitions in Big Tech is currently subject to review. See Colleen Cunningham, Florian Ederer and Song Ma, *Killer Acquisitions*, 129 (3) JOURNAL OF POLITICAL ECONOMY 649 (2021).
[127] Q&A, SAMR, The responsible comrade of the Office of the Anti-Monopoly Commission of the State Council answered reporters' questions on the Anti-Monopoly Guidelines of the Anti-Monopoly Commission of the State Council on the Platform Economy (国务院反垄断委员会办公室负责同志就《国务院反垄断委员会关于平台经济领域的反垄断指南》答记者问) (7 February 2021) http://gkml.samr.gov.cn/nsjg/xwxcs/202102/t20210207_325971.html (archived Aug. 25, 2021).
[128] *Id.* at question 9.
[129] AML, *supra* note 21, at art. 5 and Chapter 4.

transaction before clearance.[130] On 20 October 2020, the SAMR issued its *Interim Provisions on the Review of Concentration of Business Operators,*[131] which came into force on 1 December 2020 and consolidated six prior regulations issued by different authorities on merger filings. These constitute the main guidelines but there are also a number of different Guidance Opinion issued by SAMR on mergers.[132]

Similar to the way that access and ownership of data can be a factor in assessing dominance, so in merger control data can be a factor in assessing the competitive impact of a concentration. The ability to "master and process data" and to control data interfaces; whether one of the parties can control data interfaces, the existence of exclusive rights are all important factors.[133] It is also noteworthy that the Platform Economy Guidelines specifically highlight that data can form part of a remedy package imposed to assuage concerns about the anticompetitive effects of mergers, including by imposing divestiture of tangible assets, including data,[134] and "behavioral conditions such as opening up network, data or platform infrastructure", "terminating exclusive agreements, modifying platform rules or algorithms, promising compatibility or not reducing interoperability".[135]

The focus on merger control and Big Tech in China is already evident in a number of recent news.

[130] AML, *supra* note 21, at art. 21.
[131] SAMR, INTERIM PROVISIONS ON THE REVIEW OF CONCENTRATION OF BUSINESS OPERATORS（《经营者集中审查暂行规定》已于2020年10月20日经国家市场监督管理总局2020年第9次局务会议审议通过，现予公布，自2020年12月1日起施行）(23 October 2020), http://gkml.samr.gov.cn/nsjg/fgs/202010/t20201027_322664.html (archived Aug. 25, 2021).
[132] See Wei Yingling and Gong Minfang, *Merger Control in China: overview,* THOMSON REUTERS PRACTICAL LAW (1 January 2021), https://uk.practicallaw.thomsonreuters.com/5-500-8611?transitionType=Default&contextData=%28sc.Default%29 (archived Aug. 25, 2021).
[133] Platform Economy Guideline, *supra* note 48, at art 20..
[134] *Id.* art. 21(1).
[135] *Id. a*rt. 21(2).

First, the SAMR has stepped up enforcement against parties for non-reporting mergers. Under the AML, the maximum sanction that can be imposed currently is RMB 500,000. In July 2021, it was reported that Tencent will be fined the maximum amount for failing to notify the acquisition of two apps, Kuwo and Kugou.[136] At least ten other cases have been reported of tech companies fined the maximum amount for failure to notify mergers.[137]

Second, mergers have been abandoned (for example, the proposed acquisition of a controlling stake in iQIYI, a video platform owned by Baidu, in which reportedly both Alibaba and Tencent were interested),[138] with the parties citing the tightening of the rules as a reason; or have been blocked by the authority. The notified proposed merger between Huya Inc and Douyu International, two online game streaming platforms backed by Tencent that collectively control more than 80 percent of China's online game streaming market,[139] was blocked in July 2021. Both companies accepted the decision as per two identical press releases that they issued.[140]

4. Sanctions

Concerning sanctions, under article 46(1) AML, the authority "shall order" the undertaking to: (i) stop the illegal act; (ii) confiscate the illegal gains; and (iii) pay a fine up to 10 per cent of

[136] Pei Li, *EXCLUSIVE China to order Tencent Music to give us music label exclusivity-sources*, REUTERS (July 12, 2021) https://www.reuters.com/world/china/exclusive-china-order-tencent-music-give-up-music-label-exclusivity-sources-2021-07-12/ (archived July 19, 2021).
[137] These cases are listed in Bai and Poddar, *supra* note 27, at Annex 1.
[138] Julie Zhu and others, *Exclusive: Alibaba, Tencent put talks to buy iQIYI stake on hold due to price, regulatory concerns – Sources*, REUTERS (Nov. 27, 2020) https://www.reuters.com/article/us-baidu-m-a-iqiyi-exclusive-idUSKBN2870SI (archived Aug. 25, 2021).
[139] Press Release, SAMR, Announcement of the State Administration for Market Regulation on the Anti-monopoly Review Decision on Prohibiting the Merger between Huya Company and Douyu International Holdings Co., Ltd. ('市场监管总局关于禁止虎牙公司与斗鱼国际控股有限公司合并案反垄断审查决定的公告') (10 July 2021) http://www.samr.gov.cn/fldj/tzgg/ftjpz/202107/t20210708_332421.html (archived Aug. 27, 2021).
[140] Press Release, DouYu, DouYu Announces Termination of Merger Agreement with Huya' (July 12, 2021) https://ir.douyu.com/2021-07-12-DouYu-Announces-Termination-of-Merger-Agreement-with-Huya (archived July 17, 2021); Press Release, Huya, HUYA Inc. Announces Termination of Merger Agreement with DouYu (July 12, 2021) https://www.barrons.com/press-release/huya-inc-announces-termination-of-merger-agreement-with-douyu-01626089862?tesla=y&tesla=y (archived July 17, 2021).

the turnover in the preceding year. The text of article 46 suggests that the three should be adopted in parallel (so that the infringers should be ordered to pay a fine and also to return the illegal gains they made, thereby increasing the deterrent effect of the fines). However, due to a combination of lack of clear guidance and administrative convenience (as it can be difficult to determine what constitutes an illegal gain), illegal gains were confiscated only in about 30 percent of cases decided between January 2015 and June 2020, and a fine imposed in more than 60 percent of cases.[141]

When determining a fine, the authorities must consider factors such as the nature, seriousness and duration of the illegal acts.[142] The fine against industry associations is currently capped at RMB 500,000, although in serious cases the trade association can be de-registered. As seen above,[143] the fine for non-notification of a merger is also subject to a RMB 500,000 cap. Under proposals to amend the AML published for consultation on 2 January 2020 (AML Amendment Proposals),[144] the SAMR seeks to increase the penalties for breaches of the AML: against trade associations,[145] against businesses and individuals for obstruction of investigations,[146] and in merger control (for failure to notify and for breach of remedies).[147] For the first time, the AML Amendment Proposals also appear to allow for the possibility of criminal liability for breaches

[141] Josh Yi Xue, Tian Gu, Wei Yu, *Confiscating Illegal Gains in Chinese Anti-monopoly Law Enforcement Practice*, LEXOLOGY (Aug. 21, 2020) https://www.lexology.com/library/detail.aspx?g=4a4c5952-625b-4d0b-ade8-01a2d983dddc (archived Aug. 25, 2021).
[142] AML, *supra* note 21, at art. 49.
[143] See *infra* section I.A.4.
[144] Press Release, SAMR, Announcement of the State Administration for Market Regulation on the Public Consultation on the "Anti-Monopoly Law" Amendment Draft (Draft for Public Comment) (2 January 2020): the Chinese text of the proposed amendments, (《中华人民共和国反垄断法》修订草案（公开征求意见稿）) can be downloaded, http://www.samr.gov.cn/hd/zjdc/202001/t20200102_310120.html (archived July 11, 2021), [hereinafter AML Amendment Proposals].
[145] From the current upper limit of RMB 500,000 to an upper limit of RMB 5 million.
[146] The proposal is for fines for obstructions for individuals to increase from the current upper limit of RMB 100,000 to RMB 1 million; and for businesses from RMB 1 million to up to 1 per cent of turnover in the last year (or RMB 5 million if the business did not generate revenues in the past year).
[147] From the current upper limit of RMB 500,000 to a fine of up to 10 percent of the turnover of the business concerned for the preceding year.

of competition law, by stating that criminal liability may arise where the violation constitutes a crime.[148] Amendments to the AML may be forthcoming in 2021.[149]

The fines imposed on the companies that breach the prohibition of anticompetitive agreements (including for cartels) and of abuse of dominance will not change, however, and these seem to be relatively low. The fine against Alibaba for its "choose one of two" abusive practice mentioned above is very high in absolute terms, but in percentage terms, it equates to 4 percent of Alibaba's turnover in the previous year. The fines for cartels are also noticeably higher in absolute terms against international cartelists, but not in in percentage terms. In the *12 Japanese Auto Parts Cartel*,[150] Sumitomo received one of the highest fine for cartels in China in absolute terms, at RMB 290.4 million, and this equated to 6 per cent of relevant turnover. Amongst the case reviewed, only one company was fined 9 per cent of its relevant turnover in a cartel case (EUKOR Car Carriers in the *Roll-on/roll-off Services Cartel* (31),[151] even though the company seems to have provided evidence).

In Hong Kong, the HKCT can impose fines up to 10 per cent of the turnover of the business obtained in the jurisdiction for each year of infringement up to a maximum of three years; the payment of the costs of the HKCC's investigation; the disqualification of directors for up to

[148] AML Amendment Proposals, *supra* note 144, at art. 57.
[149] According to the legislative work plan of the State Council of the PRC issued on 21 June 2021. See Hogan Lovells, *Revision of China's Anti-Monopoly Law to close "loopholes" in anti-cartel enforcement* (8 July 2021) https://www.jdsupra.com/legalnews/revision-of-china-s-anti-monopoly-law-1594433/ (archived July 11, 2021).
[150] *12 Japanese Auto Parts and Bearing Manufacturers Cartel* (NDRC, 2015), see Michael Gu, *NDRC imposes record fines on 12 Japanese auto parts and bearing manufacturers*, LEXOLOGY (Sept. 25, 2014), https://www.lexology.com/commentary/competition-antitrust/china/anjie-law-firm/ndrc-imposes-record-fines-on-12-japanese-auto-parts-and-bearing-manufacturers (archived Aug. 27, 2021). See also University of Melbourne, CHINA COMPETITION BULLETIN (July/August 2014), at 2, https://law.unimelb.edu.au/__data/assets/pdf_file/0004/1796467/China-Competition-Bulletin-July-August-2014.pdf (archived Aug. 27, 2021).
[151] *Roll-on/roll-off Services Cartel* (NDRC, 2015), see Michael Gu and Sihui Sun, *NDRC rules in firt international shipping company monopoly case*, LEXOLOGY (Aug. 4, 2016), https://www.lexology.com/commentary/competition-antitrust/china/anjie-law-firm/ndrc-rules-in-first-international-shipping-company-monopoly-case (archived Aug. 27, 2021).

five years. The HKCC published a Policy on Recommended Pecuniary Penalties on 22 June 2020,[152] following the methodology indicated by the HKCT in *Competition Commission v W Hing Construction Company & Others*.[153] Fines are based on a percentage of the turnover obtained in the jurisdiction for each year of infringement, up to a maximum of three years: if the contravention spanned more than three years, then the fine would be based on the three years when the business achieved "the highest, second highest and third highest turnover."[154] To date, all fines imposed concerned cartels.

Turnover is defined as "the total gross revenue" of a firm "obtained in Hong Kong".[155] As has been remarked,[156] this is a relatively low level of fines, for two reasons: because there is a limit on the number of years considered (unlike, say, in the USA and in Canada) and because the turnover considered is limited to Hong Kong (unlike the case of other systems, such as the EU system, that takes into account the turnover on a global scale. Furthermore, as seen above, infringement notices cannot include fines.

Turnover (like in Hong Kong) and amount of sales (like in China), or revenue, differ in accounting terms, as it is possible to conceive of turnover (such as inventory turnover) that does not produce revenue, and of revenue (such as reimbursements) which does not depend on turnover of goods or services.[157] In the context of cartel cases, where pecuniary sanctions are

[152] HKCC, POLICY ON RECOMMENDED PECUNIARY PENALTIES (2020), https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Policy_on_Recommended_Pecuniary_Penalties_Eng.pdf (archived July 6, 2021).
[153] *Competition Commission v W Hing Construction Company & Others* [2020] HKCT 1 (Penalty Judgment).
[154] CO, *supra* note 39, at s 93.
[155] CO, *supra* note 39, at s 93(4).
[156] Lin and Ross, *supra* note 42, at 117–118.
[157] For a primer about the difference between revenue and turnover, see Revolut Contributor, *Turnover vs Revenue: do they mean the same thing?* (2020), https://blog.revolut.com/a/turnover-vs-revenue/ (archived July 26, 2021).

related directly to the value of sales of the businesses in question, the concepts of relevant turnover and revenue are used interchangeably.[158]

B. Tools for Detection and Enforcement: settlements and private actions; leniency and whistleblowing.

Competition authorities have a number of tools for detection and enforcement of the competition rules. Comparing and contrasting the position in Hong Kong and in China, it appears that the tools of enforcement in Hong Kong are less wide ranging than the equivalent tools in China. This holds true whether the enforcement regime is considered, or the possibility of settlements and of private actions for breaches of the rules. As far as the tools of detection are concerned, Hong Kong appears to have embraced a more aggressive approach to leniency policies. In both jurisdictions, whistleblowing is encouraged and embraced.

1. Fining the Infringers

First, competition authorities can seek to fine the infringers. Hong Kong and China differ fundamentally in the requirements to be met for issuing a fine, however and consideration of the two jurisdictions highlights the different models available. In China, as will be explained below,[159] the SAMR has very wide latitude to impose fines.

In Hong Kong, on the contrary: (i) the HKCC must institute proceedings before the HKCT; but (ii) agreements and conduct "of lesser significance" are statutorily exempt from investigation. Specifically, agreements between parties with a combined turnover of less than HK$200

[158] Yannis Katsoulacos, Evgenia Motchenkova and David Ulph, *Penalizing cartels—a spectrum of regimes*, JOURNAL OF ANTITRUST ENFORCEMENT 339, 342 (2019).
[159] See *infra* section I.C.2.

million are exempt from application of the First Conduct Rule,[160] although the exemption does not apply to instances of Serious Anti-Competitive Conduct. Firms with less than HK$40 million of turnover per year are exempt from the Second Conduct Rule.[161] This is potentially a serious impediment to effective enforcement: deciding not to investigate *de minimis* agreements should be a matter for the authorities' discretion, based on factors such as the size and competitiveness of the market, rather than the turnover of the parties. As it has also been noted,[162] based on figures provided during the debate on the adoption of the CO, the average annual turnover of small and medium enterprises in Hong Kong was HK$11 million in 2011. A threshold of HK$200 million would exempt agreements between up to 18 averaged sized small and medium enterprises in Hong Kong. Further: (iii) in the case of breaches of the First Conduct Rule that are not cartels or other instances of serious anticompetitive conduct, the HKCC must first issue a "warning notice" against the infringing parties and only if the conduct continues, it can then institute proceedings against the parties in the HKCT.[163] As has been noted,[164] this can be difficult to administered, as not in all cases it would be clear that a course of conduct meets the requirements of serious anti-competitiveness, and may reduce the willingness of the HKCC to enforce the First Conduct Rule is cases other than the most blatant instances of cartels.

2. Reaching Settlements

Second, the authorities can accept commitments from the parties under investigation. In Hong Kong, section 60 of the CO specifically allows for commitments to be accepted to end an

[160] CO, *supra* note 39, at Schedule 1, section 5.
[161] CO, *supra* note 39, at section 6.
[162] Lin and Ross, *supra* note 42, at footnote 40: this could reduce competition in "many consumer facing service industries—as long as the actions do not represent serious anti-competitive conduct.".
[163] CO, *supra* note 39, at s. 82.
[164] Kelvin Hiu Fai Kwok, *The New Hong Kong Competition Law: Anomalies and Challenges*, WORLD COMPETITION 541, 562 (2014); Lin and Ross, *supra* note 42, at 121.

investigation. This procedure does not require an admission of breach of a conduct rule, therefore, when the commitment procedure is followed, the parties aggrieved do not have a follow-on right of action against the infringers.[165] The procedure has been used in two cases, namely the *Seaport Alliance* case,[166] where the parties offered commitments during the course of an investigation into the activities of the alliance, and the *Online travel agents* (OTAs) case,[167] mentioned above. This is the only case investigated by the HKCC to date in the online/digital sector. Major online travel agents Expedia.com, Booking.com and Trip.com entered into so-called "parity" clauses with hotels in Hong Kong. Hotels were required to give terms to the OTAs that were at least the same as those they offered to any other sales channels, as regards room prices, conditions, and availability. The HKCC accepted commitments that oblige the three OTAs not to enter into parity clauses for a period of five years, and to self-report their compliance. This is a cautious approach if compared to the approach of competition authorities in Europe. Already in 2015, Booking.com announced that they were amending parity provisions in their contracts throughout Europe, following commitments they entered into in France, Italy and Sweden.[168]

Commitments can also be accepted to terminate an investigation after the HKCC issues an infringement notice, under section 67(2) CO. This possibility applies in cases of breaches of the First and the Second Conduct Rule and the HKCC has applied it in two First Conduct Rule cases to date. Six hotel groups and an operator of tour counters were issued with infringement notices in the *Tourist attraction tickets* case.[169] The HKCC found that these acted as facilitators

[165] Under CO, *supra* note 39, at s 110, see *infra* section I.B.3.
[166] Case EC/03AY, commitments accepted in October 2020, https://www.compcomm.hk/en/enforcement/registers/commitments/commitments_reg.html (archived Aug. 19, 2021).
[167] Case EC/02NJ, commitments accepted in May 2020, *Id*.
[168] See Press Release, Booking.com, Booking.com to Amend Parity Provisions Throughout Europe (June 25, 2015) https://news.booking.com/bookingcom-to-amend-parity-provisions-throughout-europe/ (archived Aug. 19, 2021).
[169] Case EC/0271, commitments accepted in January 2021, *supra* note 166.

in a price fixing agreement for tourist attractions and transportation tickets sold in hotels in Hong Kong. In this way, they facilitated a cartel between two travel service providers, Gray Line Tours of Hong Kong and Tink Labs Limited.[170] The HKCC accepted commitments and terminated the investigation. In the *Quantr* case,[171] infringement notices were issued against both Quantr and a software supplier, Nintex Proprietary Limited for their involvement in a bid rigging cartel for the provision of IT services. Quantr did not accept to enter into commitments, the case was brought in the HKCT, and Quantr was fined HK$37,702.26.[172] Nintex did accept the infringement notice,[173] took steps to strengthen its compliance programme and the HKCC terminated the investigation.

In China, in the published guidelines on monopoly agreements,[174] the SAMR specified that the parties to an investigation can offer commitments and request a suspension of an investigation[175] for all AML violations, except for hardcore cartels (price fixing, output restrictions and market allocation).[176] This is an important difference with the position in Hong Kong, where the commitment procedure is available even in case of hardcore cartels. The parties under an investigation can submit a settlement proposal that includes a number of commitments and, if this is accepted, SAMR will suspend or terminate an investigation. When

[170] The investigation against the cartelists is ongoing: Press Release, HKCC, Competition Commission issues infringement notices to six hotel groups and a tour counter operator for facilitating a price-fixing cartel (Feb. 17, 2021) https://www.compcomm.hk/en/media/press/files/EN_PR_Infringement_Notices_Tourist_Attraction_Tickets.pdf (archived Aug. 27, 2021).

[171] *Competition Commission v Quantr Limited and Cheung Man Kit,* CTEA1/2020.

[172] *Competition Commission v Quantr Limited and Cheung Man Kit* [2020] HKCT 10.

[173] HKCC, Notice issued under section 67 of the Competition Ordinance (Cap. 619) regarding anti-competitive conduct in Ocean Park bidding exercise, addressed to: Nintex Proprietary Limited (10 January 2020) https://www.compcomm.hk/en/enforcement/registers/infringement_notices/files/Infringement_Notice_Eng_20200110.pdf (archived Aug. 19, 2021).

[174] SAMR, INTERIM PROVISIONS ON PROHIBITING MONOPOLY AGREEMENTS (禁止垄断协议暂行规定) (July 1, 2019) http://gkml.samr.gov.cn/nsjg/fgs/201907/t20190701_303056.html (archived Aug. 19, 2021).

[175] *Id.* This is the first time that a Chinese competition authority has issued guidelines in a published book, as noted by Zhaofeng Zhou, *China: Settling Conduct Matters with the SAMR* GLOBAL COMPETITION REVIEW (2021) https://globalcompetitionreview.com/guide/the-settlements-guide/first-edition/article/china-settling-conduct-matters-the-samr (archived July 11, 2021).

[176] SAMR, INTERIM PROVISIONS ON PROHIBITING MONOPOLY AGREEMENTS, *supra* note 174, at art. 22.

this happens, there is no finding as to the liability of the businesses in question and therefore no pecuniary sanctions,[177] which is an attraction of the settlement procedure. The parties that enter into a settlement agreement with the SAMR can still be sued in civil litigation, however.

3. Private Enforcement

Under article 50 of the AML, private enforcement actions are available in China. The Supreme People's Court (SPC) issued guidance on both stand-alone and follow-on private action,.[178] And there is widespread acknowledgment that private litigation in China is on the ascent. As it has been noted, for example,[179] the 2020 annual report of the Intellectual Property Tribunal heard a number of antitrust cases involving ICT, pharmaceuticals, power supply, construction and security products.[180] An increasing number of standalone actions particularly against tech companies, and the development of follow-on actions, have been important developments in 2020.[181] Over the years, there has also been a gradual increase of private actions against SOEs and governmental agencies.[182]

The possibility for victims of anticompetitive actions to claim damages in a standalone private action is not available in Hong Kong. This is a change from the position under the original detailed proposals of the government for a competition law, which included the possibility to

[177] AML, *supra* note 21, at art. 45.
[178] Supreme People's Court, Rules of the Supreme People's Court on Several Issues concerning the Application of Law in Hearing Civil Cases Caused by Monopolistic Conduct
（最高人民法院關于審理因壟斷行為引發的民事糾紛案件應用法律若幹問題的規定［已被修訂］）
(2012), art. 4,
http://www.lawinfochina.com/display.aspx?id=9300&lib=law&SearchKeyword=Application%20of%2&EncodingName=big5 (archived July 11, 2021).
[179] Gibson Dunn, 'Antitrust in China—2020 Year in Review' (4 March 2021), 7,
https://www.gibsondunn.com/antitrust-in-china-2020-year-in-review/ (archived July 11, 2021).
[180] *Id.*
[181] *Id.* at 8–9.
[182] As reported in Baker McKenzie, *Competition Litigation in China—Availability of private enforcement in respect of competition law infringements and jurisdiction* (2016), https://www.bakermckenzie.com/-/media/files/expertise/antitrust/global_guide_to_competition_litigationfinal.pdf?la=en (archived July 11, 2021).

bring standalone private actions.[183] The CO provides for a right to bring a follow-on private action, against "a person" who "has contravened" or "is contravening",[184] "has been or is involved in the contravention of" a conduct rule.[185] When the HKCC accepts commitments, aggrieved third parties cannot bring an action against the infringers.

4. Leniency

Third, when a business involved in a cartel self-reports its monopolistic conduct and submits significant evidence, the competition authority may, at its discretion, grant full immunity or a reduction in fines.

In Hong Kong, the HKCC adopted leniency policies that encourage reporting of cartels (unusually, the CO allows for leniency to be granted for a breach of the First or the Second Conduct Rule,[186] but to date the HKCC has only enacted policies to deal with leniency for cartels conduct). The HKCC issued a first leniency policy for businesses in 2015 and substantially revised it in 2020,[187] at the same time as it adopted a leniency policy for individuals (such as employees or former employees of a company).[188] The HKCC issued a first leniency policy for businesses in 2015 and substantially revised it in 2020,[189] at the same time as it adopted a leniency policy for individuals.[190] Businesses that do not qualify from the Leniency Policy can enter into a cooperation agreement with the HKCC under the Cooperation

[183] Williams, *supra* note 41, at 568.
[184] CO, *supra* note 39, at s 110(1)(a).
[185] CO, *supra* note 39, at s 110(1)(b).
[186] CO, *supra* note 39, at s 80.
[187] HKCC, LENIENCY POLICY FOR UNDERTAKINGS ENGAGED IN CARTEL CONDUCT (2020) https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Leniency_Policy_Undertakings_E.pdf (archived July 8, 2021) [hereinafter HKCC Leniency Policy for Undertakings].
[188] HKCC, LENIENCY POLICY FOR INDIVIDUALS INVOLVED IN CARTEL CONDUCT (2020) https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Leniency_Policy_Individuals_E.pdf (archived July 8, 2021) [hereinafter HKCC Leniency Policy for Individuals].
[189] HKCC, Leniency Policy for Undertakings, *supra* note 187.
[190] HKCC, Leniency Policy for Individuals, *supra* note 188.

and Settlement Policy.[191] The HKCC may apply a discount of up to 50 per cent on the applicable fine. The Cooperation Policy also introduces a "leniency plus" regime. If a business has entered into a cooperation agreement in relation to a cartel, and disclose the existence of a second cartel, the HKCC can apply an extra discount of 10 per cent of the recommended pecuniary penalty in the first cartel. The leniency policy has already been successful: in the *Quantr* case for bid rigging in the procurement of IT services mentioned above,[192] the issue was brought to the attention of the HKCC by the co-bidder as a leniency applicant.

In China, the legal basis for the availability of leniency is article 46(2) AML. As in most other jurisdictions, leniency is only available for horizontal monopoly agreements concluded between competitors, under article 13–14 AML and in particular cartels. The SAMR issued its own Leniency Guidelines in June 2020:[193] the first applicant to provide evidence of a cartel not yet under investigation, and the first to provide material evidence not yet in possession of SAMR, can be granted immunity or leniency of not less than 80 per cent.[194] The second applicant can see the fine mitigated by 30 to 50 per cent. The third, by 20 to 30 per cent. Subsequent applicants can receive a discount in the pecuniary penalty of no more than 20 per cent.

Although formal leniency policies are a relatively new tool at the disposal of the authorities in China, leniency in the general sense of a reduction of the fines in exchange for cooperation with the authorities seems to have been a feature in the enforcement of the AML from the start.

[191] HKCC, COOPERATION AND SETTLEMENT POLICY (2019), https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Cooperation_Policy_Eng.pdf (archived July 8, 2021).
[192] *Competition Commission v Quantr Limited and Cheung Man Kit* [2020] HKCT 10.
[193] SAMR, GUIDELINES FOR THE APPLICATION OF LENIENCY PROGRAM IN HORIZONTAL MONOPOLY AGREEMENT CASES (横向垄断协议案件宽大制度适用指南) (2020) http://gkml.samr.gov.cn/nsjg/fldj/202009/t20200918_321856.html (archived July 11, 2021) [hereinafter SAMR Leniency Policy.
[194] *Id.* at art. 13.

In the cases reviewed, leniency was granted in at least 19 cases, starting from one of the very first cases under the AML (and the Price Law), namely the Rice Noodles Cartel sanctioned by the Guanxi Price Bureau in March 2010.[195] In the international LCD Panel Manufacturing Cartel case,[196] decided in 2013, but under the Price Law (as the breaches preceded the entry into force of the AML), the NDRC's sanctions were "relatively low" due to the participants' cooperation, applying general principles in administrative law. Leniency in the formal sense of being recognized as a specific tool for detection[197] was applied for the first time in the Sea Sand Cartel case[198] by the Guangdong Price Bureau under guidance from the NDRC. Out of the 95 cases identified, leniency considerations led to firms receiving total exemption from fines in 12 cases.

5. Whistleblowing

Finally, whistleblowing is also a powerful tool for detection. Whistleblowing is a relatively common practice in Hong Kong. In the period from the CO coming into force to November 2020, the HKCC received "around 4,600 enquiries and complaints, of which 60% were on the First Conduct Rule with cartel conduct, including price fixing, being a major concern".[199] The press release issued by the HKCC after the HKCT handed down its first two judgments makes it clear that the two cases in question were "[d]iscovered as a result of complaints from members of the public".[200] These findings are also in line with the results of surveys, such as

[195] *Rice Noodles Cartel*, *supra* note 30.
[196] *LCD Panel Manufacturing Cartel, supra* note 26. See also Xue and Yang, *supra* note 30, at ¶ 6.03.A.8.
[197] Under the terms of the AML, *supra* note 21, at art. 46(2).
[198] *Sea Sand Cartel* (Guangdong Price Bureau with NDRC guidance, September 2012), discussed in Xue Qiang and Yang Xixi, *supra* note 30 ¶ 6.03.A.7.
[199] Press Release, HKCC, Competition Commission launches "Combat Price Fixing Cartels" Campaign (Nov. 9, 2020) https://www.compcomm.hk/en/media/press/files/EN_PR_CC_launches_Combat_Price_Fixing_Cartels_Campaign_20201109.pdf (archived July 8, 2021).
[200] Press Release, HKCC, Competition Commission welcomes judgments in Hong Kong's first two competition cases (17 May 2019) https://www.compcomm.hk/en/media/press/files/20190517_Competition_Commission_welcomes_judgments_in_Hong_Kong_s_first_two_competition_cases_eng.pdf (archived Aug. 17, 2021).

the Freshfields 2020 whistleblowing survey: 48 per cent of respondents in Hong Kong said that "they had been involved in whistleblowing."[201] Possible reasons include the fact that a whistleblowing mechanism exists in Hong Kong in the finance sector, that the Hong Kong Stock Exchange is very focused on corporate governance and possibly the fact that respondents in Hong Kong may have a slightly different understanding of the practice, similar to the findings in China.[202]

In China, whistleblowing is "an age-old practice dating back to the imperial time",[203] although there is no official translation of the term in Chinese. The concept of *jubao* (literally, "accusing and reporting") is a newly invented term which emerged from the more recent anticorruption campaigns.[204] The main aim of *jubao* is to report the wrongdoing of public officials and managers in companies, and therefore this is different from the narrow Western concept of an employee reporting on its organization, usually after having exhausted the internal procedures. In China, the concept is both "broader in terms of who can blow the whistle" (any ordinary citizen can do so) and "slightly narrower as to whistleblowing channels" (it often consists of reports made to official centers and supervisory organs).[205]

A number of provisions grant rewards to whistleblowers in China, for example to those reporting safety and counterfeiting issues,[206] although there is no formal centralized policy to

[201] Nicola Jones and Stephanie Chiu, *Whistleblowing in the spotlight: why are managers in Hong Kong more likely to blow the Whistle?* LEXOLOGY (2020) https://www.lexology.com/library/detail.aspx?g=293001aa-ab47-447d-b1d7-204fb1172a99 (archived July 12, 2021).
[202] *Id.*
[203] Gong, *supra* note 46, at 1900.
[204] *Id.* at 1902.
[205] *Id.* at 1903.
[206] For example, a whistle-blower who reports on product quality or food and drug safety may receive a reward of up to RMB500,000 from the regulatory agency. See Fan Li and Stephanie Chiu, *Whistleblowing in the spotlight—what is happening in mainland China?* FRESHFIELDS BRUCKHAUS DERINGER (2020) https://riskandcompliance.freshfields.com/post/102gjm1/whistleblowing-in-the-spotlight-what-is-happening-in-mainland-china accessed 12 July 2021.

deal with whistleblowing in antitrust matters.[207] In September 2019, the State Council issued "Guiding Opinions on Strengthening and Standardizing In-process and Ex-post Regulation"[208] (Whistleblowing Guiding Opinions). This required provincial governments and the various ministries and agencies under the State Council to establish reward systems for whistle-blowers. In November 2019, the SAMR issued draft provisions purporting to grant financial rewards for whistleblowers that report serious violation of law,[209] including violations of competition law.[210] These provisions remain in draft. If they were adopted, whistleblowers under this reward scheme would receive substantially more than what is currently available under other financial reward provisions: they could receive as much as 5 per cent of the fine paid,[211] up to a maximum of RMB 1 million, or, for reporting violations of "systemic and regional risks" or that "have or may cause major social harm", up to RMB 2 million.[212]

For a number of reasons ranging from these legislative developments to social media influence, it appears that in China, like in Hong Kong, individuals are increasingly blowing the whistle.[213]

One of the very first cartels uncovered, the *Concrete Industry - Jiangsu Cartel* (5), in January 2011 was investigated following complaints by whistleblowers, unhappy about the cartel set up by the Committee for Concrete of Lianyungang City Construction Material and Machinery

[207] and because individuals in China are not liable for breaches of the competition law, there is no equivalent to the Hong Kong Leniency Policy for Individuals.
[208] Fan Li and Stephanie Chiu, 'Whistleblowing in the spotlight—what is happening in mainland China?' (2020) *Freshfields Bruckhaus Deringer* https://riskandcompliance.freshfields.com/post/102gjm1/whistleblowing-in-the-spotlight-what-is-happening-in-mainland-china (archived July 12, 2021).
[209] SAMR, Announcement of the State Administration for Market Regulation on Public Consultation on the "Interim Measures for Reporting and Rewarding Major Illegal Acts in the Field of Market Supervision (Revised Draft for Comment)" (国家市场监督管理总局关于《市场监管领域重大违法行为举报奖励暂行办法（修订征求意见稿）》公开征求意见的公告) (19 November 2019) http://www.samr.gov.cn/hd/zjdc/201911/t20191119_308625.html (archived July 27, 2021). [hereinafter Draft Whistleblowing Guidelines].
[210] *Id.* at art. 4.
[211] *Id.* at art. 12.
[212] *Id.* at art. 13.
[213] Li and Chiu, *supra* note 208.

Association. Also in 2011, in the *Package Industry Cartel* (7) a whistleblower complained about a cartel coordinated by the industry association. In 2012, an investigation of the *Wuxi Quarry Operators Cartel*,[214] (17) started based on information received from the Wuxi County Public Security Bureau. A "public complaint" filed in July 2013 triggered the investigation of the *Mayang Shale Brick Cartel*.[215] In the later *Haier RPM case*, [216] the investigation began in response to multiple reports made through the NDRC's 12358 price supervision platform in June 2015. As seen above,[217] local e-commerce companies have been reporting cartels in the courier industry (e.g. *Ningxia Courier Companies Cartel*).[218] In the *Xiamen Courier Industry Price Self-Discipline Convention Cartel*,[219] e-commerce companies were said to have driven down the profits of the courier companies, leading to the cartel. It is possible that the e-commerce companies complained.

C. The Institutional Setup

The two jurisdictions perhaps differ the most in the institutional set-up.

1. The Adversarial System of Hong Kong

It has been said that the competition law regime in Hong Kong is a "curious Frankenstein regime":[220] whilst the prohibitions are substantially based on the EU and Singapore models, procedurally Hong Kong has adopted an adversarial regime. An adversarial process is characterized by an impartial decision-maker (often a judge) with a relatively passive role. The

[214] *Wuxi Quarry Operators Cartel* (Chongqig AIC, 2014), University of Melbourne, CHINA COMPETITION BULLETIN (January/February 2015), at 4, https://law.unimelb.edu.au/__data/assets/pdf_file/0006/1796424/China-Competition-Bulletin-Jan-Feb-2015.pdf (archived Aug. 27, 2021).
[215] *Supra* note 73.
[216] *Haier RPM case* (Shanghai Price Bureau, August 2016), University of Melbourne, CHINA COMPETITION BULLETIN (July/August 2016), at 3, https://law.unimelb.edu.au/__data/assets/pdf_file/0003/2105238/China-Competition-Bulletin-July-August-2016.pdf (archived Aug. 27, 2021).
[217] *Supra* note 93.
[218] *Supra* note 95.
[219] *Supra* note 30.
[220] Pollard and Gooi, *supra* note 88, at 372, 373.

judge is not involved in gathering evidence or identifying the issues. The parties "bear primary responsibility for determining the sequence and manner in which evidence is presented and legal issues are argued".[221] Generally speaking, common law jurisdictions tend to adopt the adversarial system of enforcement, which applies, for example, in the US; Australia; and Canada (but not in the UK).

Within this system, the HKCC has a number of competition policy functions,[222] including an investigative and prosecutorial role. It is an independent statutory body in corporate form[223] with a management board of members that oversees an executive arm. The members are appointed by the Chief Executive and can be removed only in specified circumstances.[224] The HKCC's executive arm is not part of the civil service,[225] further guaranteeing a measure of independence. The HKCC also has an advisory role. Although it generally encourages businesses to carry out a self-assessment of the legality of their agreements under the competition rules, businesses can also ask for guidance.[226]

Considering that it only begun recruiting staff in May 2013, the HKCC has been very active and this has been possible due to substantial government funding.[227] In its latest annual report (2019/20),[228] the HKCC reported government subvention of approximately HK$124.3 million (approximately US$ 16 million) and 61 staff members "as at March 2020."[229] These figures

[221] Laverne Jacobs et al., *The Nature of Inquisitorial Processes in Administrative Regimes,* 24 CANADIAN JOURNAL OF ADMINISTRATIVE LAW AND PRACTICE 261, 262–263 (2011).
[222] CO, *supra* note 39, at section 130.
[223] CO, *supra* note 39, at section 129.
[224] CO, *supra* note 39, at schedule 5, section 5.
[225] CO, *supra* note 39, at section 132: 'The Commission is not servant or agent of Government'.
[226] CO, *supra* note 39, at section 9.
[227] Lin and Ross, *supra* note 42, at 129.
[228] HKCC, ANNUAL REPORT 2019/2020 (2020) Income and Expenditure Account, 58 https://www.compcomm.hk/en/media/reports_publications/files/2019_20_CC_Annual_Report.pdf (archived Aug. 19, 2021).
[229] *Id.* at 50.

show an increase from the previous year (when the HKCC reported government funding of approximately HK$105.3 million and 57 staff members). It has been noted that these levels of funding and staff are broadly in line with those of the Singapore competition authority (before the latter also acquired consumer protection functions).[230] Interestingly, as more particularly detailed below, the SAMR in China reportedly only has 40 members of staff dealing with antitrust matters at the central level.

The HKCT has adjudicative functions. Although its name, Hong Kong Competition Tribunal, suggests competition law expertise, it is in fact a specialist division of the Court of First Instance, entirely comprised of judges.[231] Its judgments can be appealed to the Court of Appeal and then the Court of Final Appeal. It also has powers to determine follow-on actions that may be brought following a finding of breach by the HKCC.

In the cases that have been decided, the HKCC has been remarkably successful in securing liability and penalty judgments. A question mark hovers over the continued ability of the HKCC to impose sanctions with a deterrent effect, however, due to the judiciary interpretation of the burden of proof that it must meet. Following the *Nutanix* judgment of the HKCT,[232] in the absence of any provision dealing with standard of proof in the CO, the standard of proof that the HKCC must meet in proceedings for pecuniary penalties is the criminal standard of proof beyond reasonable doubt, rather than the civil standard of proof on the balance of probabilities.

[230] Lin and Ross, *supra* note 42, at 130.
[231] CO, *supra* note 39, at s 135(1). Under the terms of CO, *supra* note 39, at s 141, the HKCT can appoint "specially qualified assessors" to assist with its determinations.
[232] *Competition Commission v Nutanix Hong Kong Ltd* [2019] HKCT 2 (Nutanix) (Liability Judgment). This case concerned bid rigging in Hong Kong.

This raises a question about the workability of the standard in competition law cases where complex assessments of economic data and often conflicting expert evidence are required. As the judgments handed down to date in Hong Kong related to Serious Anti-competitive Conduct, one may question whether the focus of the HKCC on hard-core cartels may also be partly dictated by the need to ensure that they can meet the required burden of proof before the HKCT.

As competition law enforcement becomes more widespread and the parties to cartels become more circumspect, it is to be expected that even direct evidence of price-fixing may not be forthcoming: the HKCC may have only circumstantial proof of the existence of the cartel. Further, as has been remarked,[233] the severity of the penalty should also be a factor. The criminal standard of proof may be warranted for individuals facing "truly criminal sanctions for offences that are *per se* in nature"[234] or, for businesses, for "a very high level of financial penalty that can be said to constitute the functional equivalent of imprisonment of a human being",[235] possibly rendering the company insolvent or "at least unprofitable for some significant period of time".[236] This is very far from the case here, given that the penalty that can be imposed cannot exceed the statutory maximum of 10 per cent of the turnover in Hong Kong for a maximum of three years.[237] As has been remarked, this leaves Hong Kong in an awkward position, "an odd middle ground" on hard-core cartels, "without the deterrent power

[233] Kelvin Hiu Fai Kwok, *The Standard of Proof in Civil Competition Law Proceedings,* 132 LAW QUARTERLY REVIEW 541 (2016). In this article, the author contrasts the position with the UK application of the civil standard of proof.
[234] Lin and Ross, *supra* note 42, at 132–133.
[235] Kwok, *supra* note 233, at 546.
[236] *Id.*
[237] On 18 June 2021, the Court of Appeal issued its Reasons for Judgment in an appeal against the Liability Judgment in the Decoration Contractors case. The HKCC had asked the Court for reconsideration of the issue of the standard of proof in proceedings for pecuniary penalties. The Court however "did not wish to consider this point on a notional basis" and therefore the issue remains to be decided. See Court of Appeal, Civil Appeal No 257 of 2019 [2021] HKCA 877.

of true criminal law (…) that has so helped encourage use of leniency programs, but with a legal process that gives respondents the protections of criminal law approach."[238]

2. The Administrative System of China

China has adopted a system of administrative enforcement,[239] and the enforcement record of the AML by the agencies in China is impressive, particularly as these have traditionally been "extremely understaffed".[240] It has been recently reported that the SAMR "plans to expand its antitrust workforce by around 20 to 30 staff, up from about 40 now"[241]: although the SAMR as a central authority can call on enforcers at the local and regional level, it is striking that it currently has centrally 21 fewer enforcer than the 61 members of staff reported in Hong Kong.

Administrative enforcement is characterized by agency discretion in the application of the rules, with the decision maker playing an "active role in identifying issues, gathering evidence and controlling the proceedings."[242] Overall, administrative systems of enforcement are adopted in the majority of jurisdictions that have enacted a competition law, including the EU and its member States; Japan; South Korea; India; Malaysia and the majority of Latin American countries.

[238] Lin and Ross, *supra* note 42, at footnote 85.
[239] Administrative systems are often called 'inquisitorial', in opposition to 'adversarial'. Due to unfortunate historical associations between the term 'inquisitorial' and lack of due process, in this paper reference is made to 'administrative' systems and 'adversarial' systems.
[240] Across the three agencies, there were fewer than 100 officials in charge of antitrust enforcement at the central level, many of whom were also in charge of other matters. See ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 24, at 24–25.
[241] Reuters, *EXCLUSIVE China's antitrust regulator bulking up as crackdown on behemoths widens* (Apr. 11, 2021) https://www.reuters.com/world/china/exclusive-chinas-antitrust-regulator-bulking-up-crackdown-behemoths-widens-2021-04-11/ (archived Aug. 20, 2021).
[242] For an overview, based on the Canadian experience, see Jacobs et al., *supra* note 221, at 262.

To date, it has been a relatively uncontroversial proposition in (Western) antitrust that in order to minimise the risks of prosecutorial bias and undue curial deference, administrative systems of enforcement of competition law require that the discretion of the competition agencies be subject to strict procedural safeguards, and to judicial scrutiny. This consensus may be eroding somewhat, in the light of policymakers' and agencies' actions and statements, as seen above.[243]

As Angela Zhang has extensively documented and analyzed,[244] however, the case of China sheds light on a number of consequences that follow when wide agency discretion in enforcing the rules meets with limited judicial scrutiny. What Zhang calls "China's great reversal in regulating the platform economy"[245] provides a good focal point to consider policy control mechanisms more generally. Specifically on antitrust, five points will be highlighted here, to show that indeed the institutional set up and the form of intervention in China are such that speed and method of enforcement guarantee impressive results (which is an advantage), at the expenses of scrutiny, "agency accountability, legal consistency and due process"[246] (the disadvantages).

First, far from being independent of government, the agencies that enforce the AML are part of the bureaucracy. Although difficult to achieve in practice, the independence of regulatory and competition law agencies is an aspiration in countries with established competition and regulatory regimes.[247] In the EU, independence of public bodies is frequently required in the

[243] See *supra,* Introduction.
[244] See, in particular, Zhang, *Taming the Chinese Leviathan*, *supra* note 36; ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 24; and Zhang, *Agility over Stability*, *supra* note 18.
[245] Zhang, *Agility over Stability, supra* note 244, at 1.
[246] *Id.* at 12.
[247] See for example OECD, THE GOVERNANCE OF REGULATORS: CREATING A CULTURE OF INDEPENDENCE (14 2017), https://www.oecd.org/gov/regulatory-policy/Culture-of-Independence-Eng-web.pdf (archived Aug. 20, 2021).

EU Treaties and in secondary law.[248] Although "independence" is not specifically defined, the term generally refers to a situation where a public body "can act completely freely, without taking any instructions or being put under any pressure."[249] As seen above, in Hong Kong the institutional setup of the HKCC guarantees a measure of independence. In the US, although the US federal government retains some control over the agencies (which "remain susceptible to shifting policy winds in Washington"[250]), the clear delineation of authority between federal, state and country government; the scrutiny by the press; and the strict judicial oversight all give agencies a relatively high level of independence from the executive, compared to China.[251]

In China, the SAMR, like its predecessor enforcers, is a Ministry level agency with multiple duties (including enforcement of the competition rules), which sits directly under the State Council of China.[252] Within this overarching bureaucracy, the leadership in Beijing "enjoys the highest authority and wields tremendous power."[253] And because the agencies derive their legitimacy from the delegation of power by the top leadership and the center, "the whole bureaucracy is organized based on an upward accountability system."[254]

This structure highlights the second point made, namely that inter-agency and inter-ministry cooperation is essential in China for antitrust enforcement. Decisions are reached by consensus, with the agency in charge of an investigation requesting the input of other organisations. The practice is known as "*huiquian*" ("countersign"):[255] if the different Ministries and agencies

[248] Study, EUROPEAN PARLIAMENT, PETI COMMITTEE, EU AGENCIES AND CONFLICTS OF INTERESTS (2020) https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621934/IPOL_STU(2020)621934_EN.pdf (archived Aug. 20, 2021).
[249] *Id.*
[250] Zhang, *Agility over Stability, supra* note 18, at 13.
[251] *Id.*
[252] Ding Liang, *China: Cartels & Leniency Laws and Regulations,* ICLG.COM (2021) ¶ 1.3, https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/china (archived July 11, 2021).
[253] *Id.* at 7 and 8.
[254] *Id.* at 8.
[255] ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 24, at 61.

agree with a proposed course of action, the State Council will ratify it. If not, the State Council will have to decide, after extensive research and more consultation with different Ministries. Inevitably, decisions are influenced by different views, and this makes them appear on occasion inconsistent with economic principles and international standards, after a deliberation process which is "rather opaque", as the agencies do not discuss the information received through *huiquian*, not even with the parties under investigation.[256]

In this highly intertwined set-up, trade associations and chambers of commerce are themselves often "converted from government ministries" (in a system historically based on a planned economy): they can and do play a key role in facilitating agreements between firms, and cartels.[257]

Moreover, rules other than antitrust, such as anti-corruption, or food safety are enforced by interconnected agencies: a conflict with any one of them can aggravate the position of a company with the others. The interdependence between agencies makes companies operating in China "particularly susceptible to an array of regulatory attacks."[258]

This is highlighted in the recent backlash against Big Tech in China: antitrust is but one aspect of the regulatory action that Big Tech now face. Financial authorities have taken the lead against Ant Financial. After the IPO was halted on 3 November 2020, Ant was summoned to a meeting by the People's Bank of China (PBOC), the Insurance and Banking Regulatory Commission, the China Securities and Exchange Commission and the Foreign Exchange Commission.[259] In January 2021 the PBOC made public its draft regulations on non-banking

[256] *Id.* at 61.
[257] *Id.* at 170.
[258] *Id.* at 71.
[259] Eliza Gkritsi, *Ant Group to meet regulators 'in the coming days'*, TECHNODE (Dec. 24, 2020) https://technode.com/2020/12/24/ant-group-to-meet-regulators-in-the-coming-days/ (archived July 19, 2021).

payment institutions (such as Ant Group; Alipay; Tencent; WeChat Pay):[260] if finalized, the PBOC will have power to send alerts to SAMR when a non-banking payment institution reaches certain market shares (lower than the shares for dominance under the AML). Authorities such as the Ministry of Transport, the Cyberspace Administration of China (CAC) and the Ministry of Industry and Information Technology have intervened against ride-hailing apps, ordering them to treat drivers more fairly.[261] Data security is at the root of the troubles experienced by Didi after their listing in New York. The CAC intervened, to carry out a "Cybersecurity review",[262] ordering it not to sign up new users and also taking the app off the app stores.

Third, judicial scrutiny tends to be weak in China: by way of example, in the cases on anticompetitive agreements identified, only three appeals were launched by the companies, all of them against local branches of the agencies and they were all unsuccessful.[263] The most interesting case concerned an appeal by Yutai, a fish feed company fined by the Hainan DRC

[260] Chinese Government, '中国人民银行关于《非银行支付机构条例（征求意见稿）》公开征求意见的通知' (Jan. 21, 2021) http://www.gov.cn/hudong/2021-01/21/content_5581574.htm (archived July 17, 2021). See also Press Release.\, SAMR, China to toughen supervision of non-bank payment institutions (2021) http://english.www.gov.cn/statecouncil/ministries/202101/21/content_WS6008b939c6d0f725769443b7.html (archived July 17, 2021).

[261] Yujie Xue and Minghe Hu, *Beijing orders Meituan, Didi Chuxing and other ride-hailing providers to give drivers a fair share of revenue*, THE SOUTH CHINA MORNING POST (May 15, 2021) https://www.scmp.com/tech/big-tech/article/3133614/beijing-orders-meituan-didi-chuxing-and-other-ride-hailing-providers (archived July 19, 2021).

[262] Lauren Dudley et al., *The final Cybersecurity Review Measures for 'critical information infrastructure' come three years after the Cybersecurity Law went into effect,* NEW AMERICA (Apr. 27, 2021) https://www.newamerica.org/cybersecurity-initiative/digichina/blog/chinas-cybersecurity-reviews-eye-supply-chain-security-critical-industries-translation/ (archived July 19, 2021). This includes an English translation of the primary source.

[263] The first case was an appeal in December 2014 against the decision by the Jiangsu Price Bureau in the Nanjing Concrete Industry Cartel. The Nanjing Intermediate People's Court dismissed the appeal, finding that the limitation period had expired. See: *Court upholds antitrust fine imposed by the Jiangsu Price Bureau,* University of Melbourne, CHINA COMPETITION BULLETIN (January/February 2015), *supra* note 218, at 9. The second case was an appeal in May 2017 by 7 of 25 accounting firms sanctioned by the Shandong AIC in the Shandong Accounting cartel. The Beijing Intermediate People's Court dismissed the appeal as to whether the Shandong AIC had determined the facts and applied the law correctly. See *Beijing court dismisses appeal against Shandong AIC's decision involving market sharing by accounting firms in Linyi*, University of Melbourne, CHINA COMPETITION BULLETIN 6 (June 2017), https://law.unimelb.edu.au/__data/assets/pdf_file/0007/2459185/China-Competition-Bulletin-June-2017.pdf (archived Aug. 27, 2021). The third appeal is referred to in the following note 264.

for RPM.[264] The company challenged the decision and won in the first instance at the Haikou Intermediate People's Court in 2017. Further to this, "NDRC officials travelled to Hainan to lobby the local government",[265] and the Hainan High Court on appeal reversed the judgment. Yutai appealed to the Supreme People's Court (SPC) and lost. Whilst the SPC acknowledged that RPM could have procompetitive effects, it found that per se illegality of RPM was justified "on the grounds that the Chinese market was not yet fully developed, and competition continues to be weak."[266] According to the SPC "requiring the administrative agency to satisfy a high burden of proof could have a chilling effect on public enforcement."[267] This contrasts sharply with the case law in Hong Kong.

The fourth point concerns the nature of the companies investigated. The Chinese Big Tech sector is dominated by private companies but much of Chinese traditional economy relies on State-Owned Enterprises (SOEs). These are themselves part of the bureaucracy, with a rank determined by their governance. The 2011 antitrust investigation of China Telecoms and China Unicom, two powerful SOEs owned by the central government, provides an illustration of the stringent bureaucratic constraints that apply.[268] In the Chinese bureaucracy, the rank of the leaders of China Unicom and China Telecom was equal to that of the leader of the agency that investigated them (the NDRC), outstripping that of the Director General of the Antitrust Bureau within the NDRC, which was responsible for antitrust matters. Central SOEs are also overseen by the powerful State-owned Assets Supervision and Administration Commission (SASAC), whose goal is to maximize the value of the assets it oversees: antitrust penalties impact share

[264] ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 24, at 77–78.
[265] ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 24, at 78, quoting an interview in November 2018, with a judge who was privy to the case.
[266] ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 24, at 78. See also Lester Ross and Tingting Liu, *China's Supreme People's Court Rules RPM is illegal* Per Se, WILMERHALE CLIENT ALERTS (2019) https://www.wilmerhale.com/en/insights/client-alerts/20190703-chinas-supreme-peoples-court-rules-rpm-is-illegal-per-se (archived July 11, 2021).
[267] ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 24, at 78.
[268] ZHANG, CHINESE ANTITRUST EXCEPTIONALISM, *supra* note 24, at 53–56.

performance and asset value. Ultimately the investigation resulted in a commitment on the part of the SOEs to reduce fees but not a fine; the investigation was effectively suspended.

Finally, procedural safeguards appear to be less developed in China than in other jurisdictions, (including Hong Kong, which has developed strict due process procedures). As seen above,[269] until recently direct case reporting by the agencies has been hap hazardous, obliging researchers to rely on second-hand accounts. Even high-profile decisions of the SAMR, such as the Alibaba decision, are short on details and analysis. Further, although guidance is issued by the authorities, it is not always followed in practice. For example, it seems that, despite the authorities" guidance that only one applicant should receive total immunity under the Leniency Policy, in fact immunity can be granted to more than one party.[270]

III: Conclusions

The above review of the antitrust laws of China and Hong Kong shows the pressure points in two jurisdictions which have adopted a competition law relatively recently, choosing different enforcement systems and institutional set ups.

The adversarial system of Hong Kong operates within the constraints of a law that is less wide ranging than other modern antitrust laws, in terms of its coverage (particularly of merger control), enforcement (specifically, the need to issue warning notices and the mandatory statutory exemptions for *de minimis* agreements); and punishment of violations (with generally low sanctions and a high burden of proof for the HKCC to discharge). The administrative system of China operates outside the constraints of robust judicial scrutiny, highlighting the

[269] See *supra* note 62.
[270] See *supra* note 80.

risk of prosecutorial bias that is inherent in any administrative system. If and when the AML Amendment Proposals[271] will become law, this aspect will be further exacerbated, as the SAMR will get powers to impose higher sanctions for specific breaches, and to enforce a separate prohibition on organizing or assisting others to enter into anticompetitive agreements:[272] the AML Amendment Proposals even appear to allow for the possibility of criminal liability for breaches of competition law, by stating that criminal liability may arise where the violation constitutes a crime.[273]

There is limited evidence as to the relative merits of an adversarial system as opposed to an administrative system of enforcement. Based on simplified economic models, adversarial methods of enforcement have been found to be effective against decision-maker bias, whilst administrative systems arguably have a better mechanism for uncovering hidden information.[274] Further, administrative systems are said to compound the issue of prosecutorial bias with undue deference by the courts,[275] particularly when undertaking "complex economic assessments".[276] On the other hand, adversarial systems can be "often more expensive and protracted"[277] than administrative ones. Especially in jurisdictions with a recent history of application of competition law, judges often lack the expertise and resources required to assess complex economic evidence.[278] Although expertise is acquired over time, to date, the Hong Kong case law mentioned above seems to validate this point.

[271] AML Amendment Proposals, *supra* note 144.
[272] *Id.* at Chapter II, Monopoly Agreements.
[273] *Id.* at art. 57. For criminal liability to be introduced, there would be a need to be an amendment to the criminal code of China.
[274] Soojin Nam, *An International Due Process Standard for Competition Adjudication? A Critical Approach* 15 ASIAN JOURNAL OF COMPARATIVE LAW 310, 327 (2020).
[275] COLOMO, *supra* note 81, at 10.
[276] *Id.* at footnote 91.
[277] Nam, *supra* note 274, at 328.
[278] See for example OECD, JUDICIAL PERSPECTIVE ON COMPETITION LAW—EXECUTIVE SUMMARY (Global Forum on Competition, 7–8 December 2017), https://one.oecd.org/document/DAF/COMP/GF(2017)4/en/pdf (archived July 4, 2021).

A comparative review of the competition laws in China and in Hong Kong serves to demonstrate that whatever the method of enforcement and the institutional set up, adversarial systems still need to provide the competition authorities with the tools they need for enforcement and detection; and administrative systems need the corrective power of judicial scrutiny and procedural limits to the discretion of the authorities. The HKCC is seeking to strike the right balance between carrying out investigations and prosecuting businesses and individuals for cartel activity, on the one hand, and encouraging compliance, cooperation and applications for leniency, on the other hand. The two aspects go together: unless businesses and individuals understand that there are significant penalties for non-compliance, they will be unlikely to come forward and to cooperate.

To paraphrase Zhang,[279] in the current debate on how to tackle market concentration in digital markets, the case of China reminds us of the value of stability, alongside the need to inject in all competition law system a measure of agility (properly subject to checks and balances).

[279] Zhang, *Agility over Stability, supra* note 18.